

4-1-2008

The Death of Strict Liability

Peter M. Gerhart

Case Western Reserve School of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Torts Commons](#)

Recommended Citation

Peter M. Gerhart, *The Death of Strict Liability*, 56 Buff. L. Rev. 245 (2008).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol56/iss1/5>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

The Death of Strict Liability

PETER M. GERHART†

INTRODUCTION

It is axiomatic that the field of non-intentional torts is divided into two domains: negligence liability and strict liability. This view of accident law is so well ingrained as to be well nigh impregnable.¹ At the level of doctrine, it permeates the new Restatement of Torts,² torts casebooks,³ and treatises.⁴ At the level of theory, a vigorous scholarly debate probes the relative domains, and the strengths and weaknesses, of negligence and strict liability—a debate that fuels both the consequentialist literature of law and

† Professor, Case Western Reserve School of Law. I thank Justin Thompson for valuable research assistance. Kenneth S. Abraham and Keith Hylton have made valuable comments on an earlier version of the article.

1. As an exception to this statement, George Fletcher has proposed a theory of reciprocal risk that purports to get away from the dichotomy between negligence and strict liability by supplying an analytical structure that supports, but is not controlled by, the dichotomy. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) [hereinafter Fletcher, *Fairness & Utility*]. His theory is, however, highly influenced by the distinction between strict liability and negligence liability, as is evident in his subsequent work. See George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1661-62 (1993) [hereinafter Fletcher, *Corrective Justice*] (reviewing JULES COLEMAN, *RISKS AND WRONGS* (1992)). I comment on this view of strict liability *infra* text accompanying notes 70-74.

2. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §§ 20-25, at 276-416 (Proposed Final Draft No. 1, 2005).

3. I have found no casebook that fails to honor the division between negligence and strict liability or that seeks to present strict liability as an application of negligence principles. See generally RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* (7th ed. 2000); MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* (8th ed. 2006); VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS (11th ed. 2005).

4. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 941 (2000).

economics⁵ and the deontic literature of corrective justice.⁶ Despite the dominance of the negligence principle, tort law is commonly perceived to contain “pockets” of liability that are thought to be strict.

Yet tort law appears to be struggling with a mirage. As I demonstrate in this Article, strict liability as a doctrinal or analytical category of accident law is dying, and should be absorbed within negligence liability. And so it should; strict liability is an unjustified and superfluous doctrinal container for addressing non-intentional harms. All of the legitimate “work” of strict liability can be—and is being—done better under the negligence regime by asking whether the injurer made reasonable decisions about activity-based matters. Accordingly, strict liability is a doctrinal shadow, and the attempt to perpetuate the notion of strict liability is an analytical failure that seeks to prove what the law is *thought* to be, rather than what the law manifestly *is*. The emperor of strict liability doctrine has no clothes.

I have two goals in this Article. The first is to support my claim that strict liability is on its death bed. In brief, I contend that courts should determine responsibility for accidents by asking both the traditional reasonableness question—namely, whether the defendant took due care—and also an activity-based reasonableness question—namely, whether the defendant’s activity-based decisions were reasonable. This latter inquiry encompasses a determination of whether the injurer’s decisions were the kind of decision that ought to be the basis of judicial intervention—the relevancy determination—and whether the relevant activity-level decisions were reasonably made.

5. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* (2004). For a recent analysis of negligence versus strict liability in connection with controlling medical mistakes, see Noam Sher, *New Differences Between Negligence and Strict Liability and their Implications on Medical Malpractice Reform*, 16 S. CAL. INTERDISC. L.J. 335 (2006).

6. See, e.g., JULES COLEMAN, *RISKS AND WRONGS* 371 (1992) (“Some cases of strict liability are covered by the principle of corrective justice because they are really cases of fault liability. . . . Sometimes innocent or justifiable conduct can be contrary to the constraints imposed by the rights of others.”); ERNEST J. WEINRIE, *THE IDEA OF PRIVATE LAW* 187-90 (1995) (showing that strict liability is inconsistent with corrective justice, but then arguing that liability for abnormally dangerous activities is nonetheless consistent with corrective justice).

Although this will abolish strict liability in name, it will preserve the present function of strict liability—which is to allow courts to find that a defendant who imposes unreasonable harm on others by an activity-based decision is responsible for that harm.

The activity-based negligence approach allows courts to assign and withhold responsibility in ways that comport with the normative, fault-based foundations of accident law. It also makes transparent the decisional factors that are relevant when determining responsibility, eschewing reliance on types of activities—such as blasting—or tests without meaning—such as ultrahazardous activities. It creates a doctrine of reasonableness that is coherent and comprehensive and that reduces reliance on “pockets” of special rules that are based on empty criteria. Finally, the approach I advocate connects the law with those who must obey the law. The relevant command under the analysis I propose would be to “make reasonable decisions as to the quality of care you use and the frequency, location, time, and method of your activities.” This tells people to follow their common sense intuitions of reasonableness when making decisions and to avoid reducing their investment in productive activities merely out of fear that their activity will later be labeled as “abnormally dangerous.”⁷

My second goal is to speculate on the implications of my analysis for understanding legal reasoning and the development of the law. By showing how the “strict liability” cases could have had the same outcome under an activity-based reasonableness test, I am essentially asserting that the legal reasons ascribed to the outcome of

7. Although I am not directly arguing that strict liability cases have had wrong outcomes, it is likely that some busy courts have been misled by the rubric of abnormally dangerous activity to impose liability when, under the analysis advanced here, doing so would be unjustified. But even when cases had correct outcomes, the damage to the legal system from unjustified legal reasoning is significant. The law should strive for a more accurate and revealing match between reasons and results, between analysis and outcomes. This is not unimportant. The law is meant to guide analysis by private lawyers as they advise their clients and this cannot be done if the law holds on to unworkable and unrevealing tests for applying strict liability. The legal system undermines its own legitimacy and coherency if it sustains categories that are disingenuous and hollow. Legal theory is distorted when it is made to address a law that simply is not there. The law should strive to align its doctrine with the justification for legal intervention.

cases were not, in fact, an accurate reflection of the justificational basis for the decision. The reasons could not provide a workable way of developing the law, a transparent way of describing what the judges were thinking, or a basis for justifying the decision to apply or withhold "strict liability." I therefore challenge the notion that judges reason their way to an outcome when they determine whether to apply strict liability.

In place of a theory of legal reasoning, I posit a theory of intuitional decisionmaking. Under this theory, judges reach results from intuition, not from a process of analytical thought; they then seek to explain their intuition with reasons. Where judges' intuition suggested that the injurer should be legally responsible despite the injurer's exercise of due care, judges developed a category of liability without fault to explain their results. This was simply a default position, however, adopted because judges lacked the analytical apparatus to understand the activity-based reasonableness concept. Now that the appropriate analytical apparatus is available, the need for that default position is gone and judges can employ that analytical apparatus to justify their imposition of liability for activity-based decisions.

Because I am exploring fault-based liability, I do not grapple with theories of distributive justice, where the only fault that can be assigned is the failure of the injurer to pay reparations. Accordingly, I put aside theories of loss distribution—theories that legal responsibility should be assigned to the party that can best absorb or distribute the loss.⁸ Such distributive theories might justify a separate doctrine of strict liability, although they hardly support the

8. See Walter J. Blum & Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641, 642 (1964) (carrying loss distribution ideas to the legislative arena); Fleming James, Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1156 (1941); Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 716 (1938); see also GUIDO CALABRESI, *THE COST OF ACCIDENTS* 39-67 (1970) (discussing and analyzing various loss spreading rationales); Dix W. Noel, *Strict Products Liability Compared with No-Fault Automobile Accident Reparations*, 38 TENN. L. REV. 297 (1971). More recent attempts to revive enterprise liability by emphasizing the distributive value of shifting costs to enterprises is found in Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck* (Univ. S. Cal. Ctr. in Law, Econ. & Org., Research Paper No. CO6-12), available at <http://ssrn.com/abstract=923574>.

current strict liability doctrine.⁹ But law and legal theory have gravitated toward theories of individual moral responsibility, the arc of loss distribution theory has peaked, and loss distribution is no longer generally thought to provide a justification of accident law as it is or as it should be.¹⁰

I also delimit the subject matter of this Article. I deal only with that branch of tort law that supposes that no-fault doctrines apply to abnormally dangerous activities, as if we could justify liability without fault on the basis of an

9. Under current doctrine, whether strict liability applies depends on the dangerousness of the activity. *See infra* text accompanying notes 40-52. Loss distribution theories suggest that responsibility should be allocated to the actor who can best distribute the risk, and this need not coincide with the dangerousness of the activity.

10. Modern products liability law is no longer seen to be based on loss spreading rationale. *See*, MARK A. GEISTFELD, *PRINCIPLES OF PRODUCTS LIABILITY* 51-58 (2006) [hereinafter *GEISTFELD, PRODUCTS LIABILITY*] (explaining why producer responsibility is not justified by insurance considerations); *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM* § 20(a)-(b), at 285 (Proposed Final Draft No. 1, 2005) ("The appeal of strict liability, it can be noted, does not depend on any notion that the defendant is in a better position than the plaintiff to allocate or distribute risk of harm"); William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1778 (1992) ("[R]isk distribution and the dispersion of losses should be given little or no weight in formulating tort policy."); *cf.* Kenneth S. Abraham, *Twenty-First-Century Insurance and Loss Distribution in Tort Law*, in *EXPLORING TORT LAW* 81, 83 (M. Stuart Madden ed., 2005) (explaining that loss distribution has long been out of academic fashion but the major expansion in "incidence and scope of liability . . . can be ascribed at least in part to loss-distribution[]").

Loss distribution arguments are often folded into arguments in favor of enterprise liability, although enterprise liability is a broader term. Conceptually, enterprise liability is built around two notions: first, that enterprises are able to spread losses, and second, that because of their superior knowledge and ability to control risks, enterprises should assume greater responsibility for their products or services. Combined, the two standards are thought to have been influential; the history is traced in George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). The responsibility aspects of enterprise liability are central to this Article, which argues that the appropriate responsibility of enterprises—and non-enterprises—can be fully developed under the negligence regime without the need for strict liability. On occasion, enterprise liability is sometimes used as a synonym for strict liability. *See, e.g.*, Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 612-13 (1998) [hereinafter *Geistfeld, Enterprise Liability*] (arguing that enterprise liability should be restricted to abnormally dangerous activities).

activity's dangerousness. This notion can be seen most prominently in the Restatement (Third) of the Law of Torts: Liability for Physical Harm, where an activity is considered abnormally dangerous if "[(1)] the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; [and (2)] the activity is not one of common usage."¹¹ I contest the validity of that test and seek to substitute an activity-based reasonableness test in its place. I do not deal directly with products liability law—which, outside of manufacturing defects, is now widely seen to be a species of fault liability¹²—although much of my analysis is applicable to products liability law as well.¹³ And I address in a separate article the death of strict liability when damage is knowingly inflicted because of necessity.¹⁴

A. Summary of My Analysis

I start with standard economic theory of strict liability, but challenge several of its underlying assumptions. Under the standard analysis, an injurer might be at fault because

11. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20(b)(1)-(2), at 278 (Proposed Final Draft No. 1, 2005). The Restatement (Third) of Torts has separate, related sections governing intrusion by livestock (§ 21), injury from wild animals (§ 22), and abnormally dangerous animals (§ 23). On the abnormally dangerous concept generally, see Joseph H. King, Jr., *A Goals Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341 (1996).

12. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(m), at 33-34 (1998); David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 744 (arguing that accidental harm can be fully addressed under the negligence regime because that regime fully embraces the variety of considerations that are relevant to an actor's responsibility). I deal with "strict liability" for manufacturing defects briefly below, see *infra* text accompanying notes 129-30, and I rely on products liability cases to emphasize the flexibility of the reasonableness test, see *infra* text accompanying notes 119-25.

13. I argue elsewhere that products liability law ought to be fully assimilated into a negligence law applicable to sellers, without any intital distinction between sales of products and services. Peter M. Gerhart, *Why Product Liability: An Inquiry Into Non-Justificatory Thought* (on file with author).

14. Peter M. Gerhart, *Vincent as a Negligence Case: A Justificational Analysis* (Case Research Paper Series in Legal Studies, Working Paper 07-18, 2007), available at <http://ssrn.com/abstract=987515>.

the quality of care she takes fails to meet the standard of reasonable care. She might, in other words, drive unreasonably fast. Alternatively, an injurer may be at fault because, although she undertakes an activity with reasonable care, she does the activity with unreasonable frequency, in an unreasonable location or time, or by an unreasonable method.¹⁵ This is an activity-based negligence case. A driver might drive a truck containing a dangerous explosive through a congested area when a less dangerous, but effective, route is available—unreasonable location or time—or the driver might be able to transport the dangerous explosive by some means—say by rail—that is less dangerous—unreasonable method. Or a manufacturer of industrial wastes might dump the wastes in a particular location often enough so that the build-up creates a hazard—unreasonable frequency. The law has an interest in apprehending each type of fault, for harm could be avoided if the fault were avoided.

Recognizing that two kinds of faulty decisions can lead to harm, strict liability is thought to be superior to negligence liability in that it casts a wider net. Ordinary negligence is thought to examine fault only in the sense of quality-of-care decisions. But strict liability makes the actor responsible for all harm—even the harm that occurs after the actor has invested in a reasonable quality of care—and it therefore also induces the actor to make reasonable activity-based decisions in order to reduce costs.¹⁶ Accordingly, putting aside administrative costs and issues relating to the victim's ability to avoid the harm, it is

15. The distinction between quality-of-care decisions and activity-based decisions was first recognized in Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2-3 (1980). It has now become a staple of the economic analysis of tort law. See, e.g., LANDES & POSNER, *supra* note 5, at 61; SHAVELL, *supra* note 5, at 193. As the text indicates, the term "activity-based decisions" encompasses decisions about how frequently to undertake an activity (frequency level decision), where to undertake an activity (location decisions), how to undertake an activity (mode or method of activity decisions), and when to undertake an activity (timing of activity decisions). See Stephen G. Gilles, *Rule Based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319, 332-36 (1992).

16. See, e.g., LANDES & POSNER, *supra* note 5, at 64-66; SHAVELL, *supra* note 5, at 202-05. A recent restatement of this view is contained in David Rosenberg, *The Judicial Posner on Negligence Versus Strict Liability*: Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 120 HARV. L. REV. 1210, 1217 (2006).

thought that strict liability should be used whenever activity-based decisions are an important determinant of harm, and that the concept of abnormally dangerous activity should be defined with respect to those activity-based decisions.¹⁷ The theory of strict liability says that sometimes it is important to address an actor's activity-based decisions, that the negligence standard cannot do that, and that we therefore invoke the strict liability

17. Professor Hylton has translated the basic insights about quality-of-care and activity-based decisions into a sophisticated theory for comparing the external costs and benefits of an activity when the activity is done with reasonable care. Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977 (1996) [hereinafter Hylton, *Missing Markets*]; Keith N. Hylton, *The Theory of Tort Doctrine and the Restatement (Third) of Torts*, 54 VAND. L. REV. 1413, 1420-23 (2001) [hereinafter Hylton, *Theory & Restatement*]. When the external costs and benefits of an activity are roughly equal, and the activity is done with reasonable care, there is no warrant for legal intervention. In that instance, any additional liability, beyond that for not being careful, will eliminate benefits as well as harm in equal proportion and will therefore produce no net benefits. Where, however, the external costs of the activity are greater than the external benefits, imposing liability will reduce those costs—by inducing the actor to engage in less activity—without sacrificing significant benefits of the activity. This can be understood in roughly the following way: when an actor uses dynamite to remove a tree that could be felled by a saw, the benefit of using dynamite—less effort—is far less than the expected external costs of using the dynamite and the activity can be called “abnormally dangerous.” Professor Hylton would therefore impose strict liability in order to internalize the costs of using dynamite that are not incurred when using a saw.

Professor Hylton's analytical approach is theoretically sound but impractical. Because we have no meter for measuring externalities, we are left with the need to compare the costs and benefits of various ways of undertaking tasks, and this can best be done by asking whether the defendant's choice of a method, location, or time for the activity was reasonable. This is essentially the inquiry that Professor Hylton's theory calls for. When a method of operation imposes greater external costs than benefits as compared to other methods it is an unreasonable method; accordingly, an inquiry into the reasonableness of the activity is the inquiry that is needed to make Professor Hylton's theory workable. Professor Hylton eschews this approach by repeating the conventional wisdom that the reasonableness inquiry does not tell us when the reduction in an actor's activity level is desirable. Hylton, *Theory & Restatement*, *supra*, at 1419. In my view, however, we can apply the reasonableness inquiry to relevant activity-based decisions. See *infra* text accompanying notes 90-130. Therefore, my Article can be understood as an attempt to operationalize Professor Hylton's theory, one that is driven by the conviction that it is better to analyze directly whether the external costs and benefits of an activity exceed those of alternative activity-based decisions—in which case the actor has chosen an unreasonable activity-based method—rather than applying strict liability just because we have the intuition that external costs might exceed external benefits.

standard, which does do it.¹⁸

Although I embrace the analytical distinction between quality-of-care decisions and activity-based decisions, and acknowledge that harm can sometimes be prevented by making more reasonable activity-based decisions, I challenge several assumptions that underlie the supposed appeal of strict liability.

Economists seem to understand harm from risk as coming from two sources: either from a lack of due care or from activity-based decisions. They leave little room in their analysis for harm that arises from non-preventable accidents or from reasonable activity-based decisions. That is why they are comfortable with the notion that strict liability will prevent harm by internalizing the costs of activity-based decisions. We can depict this understanding as follows:

Harm from Risk: Depiction One

Lack of Due Care	Residual Activity Decisions
------------------	-----------------------------------

In this depiction, there is risk left over after due care is taken, and we can consider this to be the residual risk of the negligence standard. But under this view residual risk is made up entirely, or almost entirely, of risk from activity-based decisions. After we account for harm that comes from activity-based decisions, there is no, or almost no, pure residual risk—risk left over after the costs of unreasonable

18. Cf. GEISTFELD, *PRODUCTS LIABILITY*, *supra* note 10, at 25-26 ("Once strict liability is justified as a method for enforcing the duty of care, there is no fundamental inconsistency between strict liability and negligence liability. Strict liability applies when evidentiary problems impair negligence liability, and negligence liability governs all other cases."). An early version of this argument was presented in Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055 (1972). Their proposal turned on an argument formulating a duty to investigate by the actor who could most easily get information that would avoid the harm, which they denominated as the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on the decision once it is made." *Id.* at 1060. This describes the reasonable duty to investigate and this duty is fully absorbed into the existing concept of the reasonable person. See *infra* text accompanying notes 119-25.

care or activity-based decisions have been internalized. Because strict liability internalizes all of the harm from risk it therefore fills the container of risk and gives appropriate incentives to avoid accidents. And because under strict liability we need not attribute the harm to either due care or activity-based decisions, it does not really matter whether or how we distinguish between them. Although economists are rarely clear about the role of residual risks, the assumption that strict liability eliminates all risks permeates much of the economic theory of strict liability.¹⁹

I present a contrasting view. Diagrammatically, the view can be understood in the context of the following depiction:

Harm from Risk: Depiction Two

Pure Residual

Lack of Due Care	Unreasonable Activity Decisions	Reasonable Activity	Reasonable Due Care
------------------	---------------------------------	---------------------	---------------------

Like Depiction One, this depiction accepts that harm stems from both unreasonable due care decisions and unreasonable activity-based decisions. Unlike Depiction One, however, even after the costs of unreasonable due care and unreasonable activity-based decisions have been internalized, harm from activity still results. In this depiction, there is a form of pure residual risk left over after the injurer takes reasonable care—the risk of unavoidable accidents. No matter how careful people are in either taking care or in activity-based decisions, “accidents happen.” These residual risks are the ones that are beyond human control in the sense that no decision that we can reasonably expect humans to make would have changed the outcome. Just as we know that lightning strikes even reasonably safe people,

19. See, e.g., Robert D. Cooter & Ariel Porat, *Liability Externalities and Mandatory Choices: Should Doctors Pay Less?*, 1 J. TORT L. 1, 4 (2006), available at <http://www.bepress.com/jtl/vol1/iss1/art2> (“According to the standard economic analysis of law, a rule of strict liability with perfect compensation causes injurers to internalize the risk that they impose on others. The precaution and activity levels of injurers, consequently, are efficient.”).

we know that reasonable safety does not absolve us of risk and therefore from harm.

Depiction Two invites us to focus on three questions that explore the different views about strict liability.

First, the economic analysis of strict liability seems to have ignored the possibility of pure residual risk that I portray here, and therefore has not addressed the question of whether we want to make pure residual risk an occasion for imposing liability. This stands in sharp contrast with the analysis when we focus on the level of care. Under negligence, we recognize that when due care is taken there is no warrant for imposing liability, which gives us the residual category of reasonable harm. The intuition behind the theory in this Article is that just as actors can make reasonable care decisions, they can also make reasonable activity-based decisions. They may perform their activity at the least risky place or time, by a method that is least risky, or with a frequency that is matched by their productivity. When they do, I do not see why we would impose liability on those decisions, and it will be detrimental to do so.

I argue that an actor should not be responsible for the consequences of reasonable decisions—either due care or activity-based decisions—and that strict liability should be avoided because it violates that principle. If an accident is unavoidable because the injurer has made reasonable decisions about her quality of care and her relevant activity base, that means that the injurer could not have reduced the harm by any act that we expect humans to take. In my view, it is inconsistent with the requirements of justice to hold the injurer responsible for the harm under these circumstances.²⁰ By pointing out the inappropriate overbreadth of strict liability, I argue that the strict liability regime should be avoided unless there is no other way of interdicting unreasonable activity-based decisions.

A second question I raise is whether some activity-based decisions ought to be per se reasonable. Standard economic analysis assumes that society *should* care how frequently an activity is undertaken. This assumption rests on the notion that the normative force of tort law requires the law to care about whether an activity is done with

20. See *infra* text accompanying notes 54-74.

reasonable frequency. More particularly, it assumes, for example, that we should care how often a person goes to the grocery store.²¹ I dispute this assertion. Liability should not be imposed on many frequency level decisions because it is often not unreasonable for a person to ignore the harm from frequency decisions. We normally do not want to make the frequency with which an activity is done the source of responsibility because we do not expect or require people to evaluate their frequency decisions from the standpoint of risk. Doing so would unduly impinge on people's freedom of activity.²² As I argue below, it would be a strange legal system indeed that assumed that when people decide how often to drive to the grocery store they either would, or should, take into account the fact that the risk of harm is repeated with the frequency of the trips.

Finally, I challenge a third assumption underlying the supposed superiority of strict liability, namely that common law courts are not able to make judgments about the reasonableness of an actor's activity-based decisions, and that courts should resort to strict liability—notwithstanding its over-breadth from the standpoint of fault—because they have inadequate tools for determining when an actor has made unreasonable activity-based decisions.²³ Thus, it is said that information costs for such a determination would be too high, making the reasonableness of the decision “unobservable.”²⁴ And it is said that courts are unable to

21. See Shavell, *supra* note 15, at 2.

22. See *infra* text accompanying notes 75-82.

23. See, e.g., KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 163 (2d ed. 2002) (“In theory, there could be liability for the ‘negligent’ decision to ship always by truck, on the ground that it would be safer, all things considered, for me to ship via some alternative method. But in practice this never happens, because of the difficulty of demonstrating that it is negligent to have engaged in a particular activity (such as shipping by truck) at all.”); Steven Shavell, *Economics and Liability for Accidents*, in *NEW PALGRAVE DICTIONARY OF ECONOMICS* (Steve N. Durlaf & Lawrence E. Blume eds., 2d ed. forthcoming 2008), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/shavell_535.pdf. Landes and Posner acknowledge that courts can examine activity-based issues when low information costs are offset by the advantages of examining activity-based decisions—as in nuisance cases and rescue cases—but they generally believe that the information costs of examining activity-based decisions are high. LANDES & POSNER, *supra* note 5, at 70-71.

24. Giuseppe Dari-Mattiacci & Francesco Parisi, *The Economics of Tort*

make judgments about whether the frequency of driving was a cause-in-fact of the harm.²⁵ The theory of strict liability is really a theory of the inadequacy of the reasonableness standard.

I argue, as others have before me,²⁶ that the reasonableness standard is infinitely flexible and adaptive. For those activity-based decisions that are relevant to the determination of responsibility, we should not underestimate a court's capacity to assess the reasonableness of activity-based decisions. In cases where *frequency* decisions are relevant to fault—such as when toxic chemicals are dumped repeatedly in the same place²⁷—courts can recognize and address the issues without undue expense or error. Other relevant activity-based decisions require only a comparison of two different ways of doing an activity—for example, whether an activity should be done in one of two places, by one of two methods, or at one of two times. Such comparisons are functionally similar to the general quality-of-care inquiry, which asks whether a task should be done one way or the other. This assessment is the kind courts make all the time and is susceptible to the same kind of burden shifting and presumptive devices that animate ordinary negligence law.

Not only is strict liability an unnecessary, overly broad,

Law: A Précis, in THE ELGAR COMPANION TO LAW AND ECONOMICS (Jürgen G. Backhaus ed., 2d. ed. 2005), available at <http://ssrn.com/abstract=458701> ("Although courts may occasionally take into account the frequency of an activity in their assessment of negligence, often no threshold of 'optimal frequency' can be easily utilized by legal rules as a liability allocation mechanism, given the difficulty of pinpointing a critical value to separate efficient from excessive activity.").

25. See Gilles, *supra* note 15, at 333 (discussing the difficulty of proving that activity-based decisions caused harm).

26. See, e.g., *id.* at 320; John J. Donohue, III, *The Law and Economics of Tort Law: The Profound Revolution*, 102 HARV. L. REV. 1047, 1059 (1989) ("[O]ne who blasts [dynamite] as carefully as humanly possible could still be deemed negligent if the court found that the net social benefits could be increased by using a wrecking ball rather than dynamite." (footnote omitted)).

27. See, e.g., *State Dep't of Env'tl. Prot. v. Ventura Corp.*, 468 A.2d 150 (N.J. 1983) (applying strict liability for dumping mercury wastes into water over fifty years). *But see* *Yslava v. Hughes Aircraft Co.*, No. CIV-91-525-TUC-ROS, 1998 U.S. Dist. Lexis 17228, at *1 (D. Ariz. June 26, 1998) (assigning no strict liability for abnormally dangerous substances because strict liability applies to activities, not substances, and stating that where accumulation does not cause harm there is no liability).

and harmful doctrine, it is a mirage. The results in "strict liability" cases could easily have been reached under the activity-based reasonableness test that I propose here—even those cases that we have thought of as quintessential "strict liability" cases: *Rylands v. Fletcher* and the blasting cases.²⁸ And the modern analytics of strict liability have not been lost on courts. By and large courts are abandoning the distinction between strict liability and negligence liability. To be sure, plaintiffs still bring claims in strict liability, courts still analyze and respond to those claims, and judicial decisions are sometimes still couched in terms of strict liability. Yet a close reading of the "strict liability" cases shows that what many courts are doing is assessing the defendant's activity-based decisions—those that relate to the frequency, location, method, or timing of the activity—and are applying the label "strict liability" when they believe that those decisions were unreasonably made.²⁹ The result is a kind of doctrinal charade, with courts doing the negligence analysis that determines whether to hold the injurer responsible for the harm and then applying a strict liability label, but without clearly showing the analysis that led to the result.³⁰

B. *An Illustration*

A straightforward illustration demonstrates these points. In *Hammontree v. Jenner*, the defendant, an epileptic, was under a doctor's care.³¹ He had been given a drivers' license on the condition that he follow his prescribed treatment.³² One day he drove into the plaintiff's bicycle shop, testifying later that he had blacked out.³³ When the owner of the

28. *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.); see *infra* text accompanying notes 131-48.

29. See *infra* text accompanying notes 156-68.

30. Much the same charade has occurred, of course, in products liability law. The notion that a defendant is strictly liable for warning and design defects is no different from the argument that a defendant is strictly liable for negligent acts. The strict liability label is meaningless unless we can define defect (or negligence) and once we define defect (or negligence), the term strict liability is surplus.

31. *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 530 (Cal. Ct. App. 1971).

32. *Id.*

33. *Id.*

bicycle shop sued, the court applied the negligence rule, refusing to say, as the plaintiff claimed, that the defendant should be responsible for the harms caused by his defective condition.³⁴ The court did not refer to the language of strict liability, but it held in effect that the defendant's condition was neither abnormally dangerous nor defective, even though the risk of seizure could be controlled, but not eliminated, with medical treatment. Because the plaintiff could not prove that the defendant acted unreasonably in light of his condition, the plaintiff recovered nothing.

This was an especially compelling case for the plaintiff, presenting something of a challenge to the fault-based tort system. The plaintiff contributed nothing to the accident—except to open a bicycle shop on that street—and the defendant controlled any information that might have shown that he did not take due care, making it hard for the plaintiff to prove, for example, that he had not taken his medicine or had ignored signs that might cause a reasonable person to refrain from driving. Yet the negligence rule protects a defendant and allows the loss to lie where it falls. Why?

In effect, the negligence rule suggests that the law does not want to inquire into whether it was reasonable for the defendant to drive. The frequency of driving is not relevant to the defendant's responsibility. This result is necessary to preserve the autonomy and free movement of the disabled and to avoid imposing extra costs on a disabled person who has exercised all reasonable control over the disability.³⁵

34. Plaintiff's lawyer cleverly argued that if an auto manufacturer is "strictly liable" for defective products, then a driver should be "strictly liable" for his defective condition. The court found "some logic" in this syllogism, *id.* at 531, but declined to apply it because it would upset the negligence regime that is generally applied to automobile driving, *id.* at 531-32.

35. Corrective justice theories would articulate the governing principle in terms of preserving the capacity of the defendant to lead the kind of life he chooses, given his ability to reasonably control his disability. See, e.g., John B. Attanasio, *Aggregate Autonomy, the Difference Principle, and the Calabresian Approach to Products Liability*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 299, 299-300 (David G. Owen ed., 1995); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 311, 342-43 (1996) ("[P]ersons have a deep and powerful interest in leading their lives in ways that accord with their aims and aspirations. . . . [This requires us to consider] the burden that the untaken precaution imposes on the injurer's freedom of action" (emphasis omitted)); Richard W. Wright, *Justice and Reasonable Care in*

Until we can determine that the driver failed to exercise reasonable care over his disability or that the risk of getting in the car was excessive in comparison to the importance of the freedom to drive, the activity-based decision of the defendant was not the source of legal liability.

Strict liability would distort this scheme. Under strict liability, an epileptic who took reasonable precautions to reduce the risk of a seizure while driving—and therefore did all he reasonably could to avoid harm—would have to fear that every time he got in the car he would have to pay for the privilege of driving, even though drivers without that condition would drive without that fear. The tradeoff between the victim's harm and the defendant's freedom of movement is a difficult one, but the social value the court endorsed by choosing the negligence rule—to preserve the defendant's freedom of movement unless the plaintiff can show negligence³⁶—is a justifiable one.³⁷

Negligence Law, 47 AM. J. JURIS. 143, 164-65 (2002) (adopting the Kantian notion that “[a]ll persons should be treated as ends in themselves (i.e., as free and equal persons seeking to fully realize their humanity)”). Law and economics scholars would emphasize that the defendant invested the appropriate amount of society's resources in controlling the risk, that the law could not compel the defendant to be more than reasonable, and that imposing liability without fault would reduce the actor's incentive to engage in productive activity. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

36. One problematic aspect of this case was the difficulty of proving that the defendant was negligent even if the defendant had been negligent. If the defendant had been negligent it would have been because he failed to take his medicine or engaged in behavior that a reasonable person with his disease would have avoided, but the evidence about those matters was entirely in the control of the defendant. The deficiency of the fault based regime is that it might deny recovery when the defendant was at fault simply because the plaintiff could not demonstrate the fault. This is the problem of false negatives. This deficiency can be minimized. The law has proved flexible enough to adjust to this deficiency through various procedural devices. Indeed, in *Hammontree* itself, the court gave the jury a *res ipsa loquitur* instruction, which allowed the jury to find for the plaintiff if the jury disbelieved the defendant's testimony about the steps he had taken to control his disease. For a discussion of the use of *res ipsa loquitur* and similar procedural devices to ease the plaintiff's burden of proof in the context of activity-level negligence determinations, see *infra* text accompanying notes 126-27.

37. Once we know that the defendant has acted reasonably, and once we conclude that the plaintiff could not reasonably have reduced the harm by self-protecting, the choice of where the loss should fall consists of a choice between two innocent victims—one the victim of epilepsy and one the victim of the accident. For the reasons given *supra* note 35, the law lets the loss lie where it falls. Bad luck is owned by the victim.

But if we change the hypothetical, we can see how an activity-based reasonableness inquiry can impose sensible limits on activity-based decisions. Assume that the defendant with the epilepsy decided to become a taxi driver. That would mean that he would be on the road more frequently and that would increase the social risk from his epilepsy by increasing the possibility that if he had a seizure it would be while driving. At the same time, neither the defendant nor society would bear a great cost if the law put pressure on the defendant to take a less risky job—presumably he would be fit for many other jobs and would offer society no special benefits as a taxi driver.³⁸ Under these circumstances, it would make sense to say that although a court would not be concerned about the risks that a reasonable epileptic driver imposes on society by general driving, the court might be concerned if the defendant chose to be a taxi driver—just as the defendant, being reasonable, is likely to say that he should find another, less dangerous profession. In this context, the choice of becoming a taxi driver is not a reasonable one because it increases the risk of harm from the disability without substantially increasing the benefits to society or the opportunities available to the driver (given our assumption that many other jobs would be open to him).

True, we could use strict liability to rule against the defendant in this hypothetical. We could say that taxi driving under these circumstances is an uncommon or abnormally dangerous activity. But this would be confusing and unnecessary. Certainly taxi driving in general is neither an abnormally dangerous nor an uncommon

38. Presumably, the defendant would be able to find other, less dangerous employment. Although the defendant would have to accept less attractive employment, and would suffer if similarly attractive jobs were not available, we can well believe that foregoing the opportunity to drive a taxi is a small sacrifice for the defendant to make to reduce the risk of harm to others. It does not matter to the point made in the text that this reasonableness calculation might be disputed. If the defendant were uniquely qualified to drive a taxi and for no other profession, if society could not find someone who was as well qualified to drive a taxi, and if the risks of driving a taxi were not as great as imagined in this hypothetical, that might change the outcome of the analysis. However, the general point in the text would not change—namely, that the choice to become a taxi driver would shift the focus from whether the defendant took due care to control his epilepsy to whether it was reasonable to become a taxi driver even if due care reduces the risk of a seizure. The shift in focus is the shift from due care to an activity-based standard.

activity, and although taxi driving by an epileptic with this condition is unreasonably dangerous—as described in the last paragraph—the conclusion does not follow naturally from the words “abnormally dangerous.” Because “abnormally dangerous” is thought to apply to blasting and dangerous animals, the analogy to an epileptic taxi driver would be obscure. The words “abnormally dangerous” simply do not indicate the range of relevant considerations for determining the responsibility of an epileptic driver.³⁹ The conclusion that driving a taxi is abnormally dangerous is really the conclusion that choosing to be a taxi driver under these circumstances is an unreasonable choice—under the analysis of the last paragraph. The better approach is to apply an activity-based negligence test—determining whether the decision to be a taxi driver is unreasonably dangerous given the options—because only that test points to the analysis that should be done to determine whether the epileptic’s choice of profession was faulty.

C. Outline of This Article

My assault on the “rule” of strict liability can be captured in five propositions, which are presented in Section I of this Article: (A) we have no normative, workable test for determining when strict liability should be applied; (B) liability should not be imposed when the defendant has made reasonable activity-based and due care decisions; (C) for normative reasons, liability should not be imposed on many frequency decisions; (D) courts have the capacity to assess the reasonableness of relevant activity-based decisions; and (E) the outcome of strict liability cases can best be understood as applications of the fault-based theory that I outline.

39. The analysis might be done under the “uncommon activity” branch of the strict liability test. Indeed, it would not be surprising if taxi companies did in fact screen their drivers for conditions like epilepsy that increase the risk of harm as the activity increases in frequency. And insurance companies might make epileptic drivers, or their employers, pay more for insurance. But thinking about this activity in terms of the “commonness” of the activity is also problematic. The notion of uncommon activity is not self-defining nor is its content known. The words themselves do not lead the analyst to look at the kinds of considerations that are relevant to determining whether it is unreasonable for an epileptic to choose one profession over another.

But the story of strict liability contains a broader lesson. If I am correct that strict liability cases could have had the same outcome under an activity-based reasonableness test, we must consider why courts did not adopt such a test. Given the alternative I offer, why did the doctrine of strict liability originate and survive? My theory is that courts were not capable of understanding the analytical basis of their decisions, that they intuitively understood that sometimes the injurer should be held responsible even though the injurer exercised due care, and that they devised the theory of strict liability to embody their intuition even though they could not explain it. This suggests that legal reasoning sometimes proceeds from intuition to analytics, from outcomes to reasons, rather than the other way around. I discuss the implications of this idea for a theory of legal reasoning in Part II.

I. THE FIVE PROPOSITIONS

A. *Proposition One: We Have No Normative, Workable Test for Determining When Strict Liability Should Apply*

Strict liability doctrine is defective because the line between negligence and strict liability is defectively ephemeral.⁴⁰

40. Mark Geistfeld has argued that courts can interpret the factors in section 520 of the Restatement (Second) of Torts to provide a coherent basis for determining when to apply strict liability. RESTATEMENT (SECOND) OF TORTS § 520 (1965); Geistfeld, *Enterprise Liability*, *supra* note 10, at 652-59. Geistfeld's analysis, however, does not provide a justification for strict liability. We can interpret his analysis to also show that the factors in section 520 can help a court determine when an activity-based decision is unreasonable, as he himself recognizes. Geistfeld, *Enterprise Liability*, *supra* note 10, at 657 ("Of course, these factors are also relevant to a negligence determination, but the deterrence rationale for strict liability proceeds from the premise that a negligence inquiry cannot always adequately evaluate every factor relevant to deterrence."). Because I reject the premise that the "negligence inquiry cannot always adequately evaluate" relevant factors, *see infra* text accompanying notes 90-130, I reject the need for strict liability as a separate doctrine.

There is an irony in the intellectual history of strict liability. Section 520 of the Restatement (Second) of Torts made it clear that courts determine whether an activity is abnormally dangerous by going through the kind of activity-based reasonableness analysis that I espouse here. RESTATEMENT (SECOND) OF TORTS § 520 (1965). Commentators who favor wider responsibility recognized this and rejected the Restatement. *See, e.g.*, Jones, *supra* note 10, at 1712 ("[T]he general

The realm of strict liability is thought to apply to abnormally dangerous activities, which are thought to be activities that present significant residual risk—that is, risk not eliminated when an actor takes reasonable care. Accidents resulting from residual risk are said to be “unavoidable,” in the sense that human agency cannot practicably avoid the accidents. One problem with this understanding is that we need a theory that would explain why we would allocate residual risk to one person rather than another. After all, residual risk is risk that cannot be eliminated by human ingenuity—it is the risk of bad luck—so it is not clear why the risk should fall on the injurer rather than the victim. I address the issue of how we allocate harm from residual risk in the next section. In this section, I address the concept of residual risk itself.

The concept of residual risk would not be problematic if it were understood to relate to risk that cannot be eliminated by due care but that *can* be eliminated by changing an actor's unreasonable activity decisions. If that is what is meant by residual risk, then the concept of strict liability would point to the need to address activity-based decisions as well as due care decisions. But that would not justify strict liability if, as I argue below,⁴¹ activity-based decisions can be addressed adequately under the negligence regime. Then, negligence would eliminate both types of risk and the only relevance of strict liability would be to address the pure residual risk that can be eliminated by changing neither due care nor activity-based decisions (which I claim is an illegitimate basis for imposing responsibility on an

approach of the Restatement is flawed and should be revised.”); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 272-73 (1987). Supporters of traditional views of “abnormally dangerous” strict liability did not understand this. See, e.g., W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 555 (5th ed. 1984) (arguing that section 520 of “the First Restatement set forth the best way of articulating and describing the requirements that ought to be met for applying strict liability to dangerous activities”). Once one rejects the loss spreading rationale, section 520 can be seen to have eroded the notion of strict liability by making it clear that putting a case in the strict liability category depends on whether the defendant acted unreasonably. Others have recognized the reasonableness pedigree behind section 520. See, e.g., Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 970 (1981).

41. See *infra* text accompanying notes 90-130.

actor⁴²).

But residual risk is generally thought of in a different, problematic way—as a form of risk left over after due care is taken, and significant residual risk, the concern of strict liability, is thought to be residual risk that is greater than normal—and hence risk that is abnormally dangerous. It is as if some activities have normal residual risk after reasonable care is taken and other activities have abnormal residual risk after reasonable care is taken, and that only the latter risk is worth addressing. This common conception is problematic. We have no test for identifying the amount of residual risk and no theory as to why some amounts of residual risk ought to be the source of liability while lesser amounts of residual risk ought not.⁴³

The problem of identifying the amount of residual risk is apparent from the negligence standard. The negligence standard revolves around eliminating unreasonable risk given the activity's danger. The standard is geared toward determining when the defendant should have reduced the risk, but the negligence standard says nothing meaningful about the residual risk that is left over once the unreasonable risk is eliminated—except that, under the negligence standard, the victim should bear it. A court that finds that the defendant acted reasonably says nothing about the degree of risk that remains. Our negligence standard tests tell us when an actor leaves unreasonable risks but we have no independent concept or test for

42. See *infra* text accompanying notes 54-60.

43. It is possible to argue that residual risk is related to the technology of precautions, that when an activity is new the technology of precautions is likely to be underdeveloped, and that we can identify large amounts of residual risk by identifying the underdeveloped nature of the precautions provided by existing technology. Under this view, strict liability would hasten investment in the technology of new precautions and reduce residual risk to acceptable levels. Although this view of residual risk has some coherence, it is not clear by what test we would determine whether the technology of precautions is underdeveloped, for this implies knowledge about what is possible in the future. Moreover, if an actor is not actively investing in the technology of better precautions, or implementing them when they are known, it is likely that the actor would be acting unreasonably. See *infra* text accompanying notes 119-26. Finally, the notion that residual risk can be identified by evaluating the technology of precautions implies that strict liability would apply at early stages of new activities but not at later stages, which is not how strict liability is now understood.

determining the amount of residual or reasonable risk.

It is often thought that we can use the dangerousness of an activity as a proxy for determining the amount of residual risk, but this is wrong. In fact, the negligence standard automatically adjusts as the riskiness of the activity increases. The more risky an activity, the greater the precautions that must be taken and thus the less residual risk. Accordingly, as the dangerousness of the activity increases the space for strict liability decreases,⁴⁴ which makes it impossible to associate strict liability with dangerousness alone.⁴⁵

Conversely, it is sometimes mistakenly believed that a non-dangerous activity is likely to have little residual risk,⁴⁶ but, as a matter of logic, that is not true. Depending on the type of precautions that are possible, it is conceivable on logical terms that an activity could have a relatively small risk of harm before reasonable precautions are taken but a high residual risk after precautions are taken. Think of a water main. There may be few precautions that can help us predict where the water main might break, and most water main breaks might cause relatively little damage. Yet, the damage from some water main breaks

44. See, e.g., *Ergon, Inc. v. Amoco Oil Co.*, 966 F. Supp. 577, 583 (W.D. Tenn. 1977) (finding that the storage of gasoline requires a high degree of care); *Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 245 (Ill. App. Ct. 1995) (finding that the use of firearms requires a high degree of care); *Resteiner v. Sturm Ruger & Co.*, 566 N.W.2d 53, 55 (Mich. Ct. App. 1997) (addressing a claim that the storage of firearms requires a heightened degree of care); *Matulevich v. Matulevich*, 498 A.2d 939, 941 (Pa. Super. Ct. 1985) (requiring a higher degree of care in the handling of firearms); *Brigham v. Moon Lake Elec. Ass'n*, 470 P.2d 393, 395 (Utah 1970) (applying a strict liability standard to high tension electrical transmission wires); *Foster v. City of Keyser*, 501 S.E.2d 165, 168 (W. Va. 1970) (finding that the transmission of natural gas requires high degree of care).

45. See, e.g., *Ind. Inner Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990) (refusing to apply strict liability based on the dangerousness of a chemical alone).

46. The Restatement (Third) of Torts for example, says that: "The absence of a highly significant risk is one of several reasons that courts have been unwilling to impose strict liability for harms caused by leaks or ruptures in water mains: the likelihood of harm-causing incidents is not especially high, and the level of harm when there is such an incident is generally not severe." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20(g), at 287 (Proposed Final Draft No. 1, 2005). This seems to equate a low level of average dangerousness with a low level of residual harm after due care is taken.

could be high, depending on where they occur. Little average danger implies that fewer precautions have to be taken and that might imply that the residual risk after those precautions are taken is more than trivial. It all depends on the technology of precautions.⁴⁷

In other words, there is no *a priori* reason to think that the amount of residual risk is related to the danger presented by the activity. The dangerousness of the activity when reasonable precautions are not taken is a poor proxy for the residual risk after reasonable precautions are taken. And there is no other known test for determining which activities are associated with high residual risk and which are not.⁴⁸

Aside from having no test for determining when residual risk is high, we have no convincing theory for why *high* residual risk should be shifted from the victim to the injurer while *low* residual risk should not be. Of course, high residual risk is, by definition, more dangerous than low residual risk, but if the law should be troubled by high residual risk, why would the law not also be troubled by low residual risk? No theory of strict liability addresses the question of why high residual risk should be the occasion

47. In other words, when a water main breaks, it could be that the cost of precautions is very high; after all, it is difficult to predict where and why a water main will rupture. That implies that there may be few precautions that can realistically be taken to prevent water main breaks, which indicates that the residual risk would be high. Under the "residual risk" version of strict liability, this would be a good case for strict liability, but strict liability is not applied in these cases (apparently because the average danger is not great). See, e.g., *John T. Arnold Assocs. v. City of Wichita*, 615 P.2d 814 (Kan. Ct. App. 1980); *Reter v. Talent Irrigation Dist.*, 482 P.2d 170 (Or. 1971) (applying the same standard to an irrigation ditch).

48. Some theorists appear to believe that residual risk can be identified by determining the risk that is addressed by modifying activity-based decisions. See, e.g., Rosenberg, *supra* note 16, at 1215-16. Under this view, risk is created by either the lack of due care or by inappropriate activity-based decisions, and does not otherwise exist. To the contrary, as I argue below, we can understand the risk of human activity to derive from three sources: lack of due care, inappropriate activity-based decisions, and bad luck. We have no *a priori* test for distinguishing between the three sources of risk and therefore no *a priori* basis for determining which residual risk should subject one to liability. One aspect of the strict liability debate is whether the risk from bad luck should fall on the injurer or the victim, and we do not even address that issue unless we have a way of distinguishing the residual risk—after due care is taken—from activity-based decisions and the residual risk from bad luck.

for shifting losses while low residual risk should not be. We have no theory that posits responsibility on the basis of harms⁴⁹ and thus none that posits responsibility on the nature of residual harms.

In this respect, strict liability cannot be justified as an extension of the doctrine of *res ipsa loquitor*. Rather than being complimentary concepts, as is sometimes assumed, strict liability and *res ipsa* are competing concepts—the domains of the two concepts are different. *Res ipsa* is relevant where the residual risk is small—that is, where due care eliminates most of the risk. Otherwise, it would be impossible to say that the accident is “of a kind which ordinarily does not occur in the absence of negligence.”⁵⁰ But strict liability is thought to apply when there is a large residual risk, and that implies that the harm could have occurred even after due care has been taken. So *res ipsa* applies precisely in those cases in which strict liability is not relevant under the concept of abnormally high residual risks.

The absence of a basis for distinguishing between degrees of residual harm could support a case for the universal application of strict liability. Some have argued, logically, that if strict liability is good when residual harm

49. The Restatement (Second) of Torts adopted the notion that recovery in private nuisance could be justified if “severe” harm is “greater than the other should be required to bear without compensation.” RESTATEMENT (SECOND) OF TORTS § 829A cmt. a (1965) (stating that “[t]he rule stated in this Section applies to conduct that results in a private nuisance, as defined in § 821D”). This appears to be a theory of harms, but, as the Restatement (Third) of Torts says: this standard has “not been helpfully clarified by any large number of subsequent judicial opinions.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20(c), at 282 (Proposed Final Draft No. 1, 2005). The law could make responsibility depend on the substantiality of the harm that occurs, rather than on the unreasonableness of the harm, but if it did it would have to rework the negligence standard itself. Likewise, it is sometimes assumed that Judge Reid’s concurring opinion in *Bolton v. Stone*, [1951] A.C. 850, 864-68 (H.L.) (U.K.), endorses a test that makes responsibility flow for imposing substantial expected harms, without regard to the cost of precautions for avoiding those harms. See, e.g., WEINRIB, *supra* note 6, at 149. Properly understood, however, *Bolton v. Stone* dealt with the substantiality of the harm at that location, and thus implicated only the reasonableness of location decisions. See *infra* text accompanying note 111.

50. DAN B. DOBBS, THE LAW OF TORTS 371 (2000). This is the traditional restatement formulation from the RESTATEMENT (SECOND) OF TORTS § 328D (1965).

reaches significant levels then it ought to be good as well for lower levels of residual harm, which leads them to advocate strict liability as the general rule for business activities that lead to harm.⁵¹ But that approach assumes that responsibility is somehow related to the residual harm of activities, and it ignores the costs of imposing liability without fault when residual harm cannot be eliminated. As I argue in the next section, residual risk is the very risk over which human agency has no control (once we eliminate risk that can be controlled by reasonable due care and activity-based decisions). If we are to give human agency a central role in our theory of torts—as I think we must—then we would want to think carefully about how we allocate the losses from risk that is beyond human agency.

In the absence of a convincing test for determining when residual harm is significant and a convincing theory to explain why defendants should be responsible only when residual harm crosses some threshold, the line between strict liability and negligence liability is uncertain and unstable, which deprives strict liability of any predictive or justificatory power. Not surprisingly, the cases are widely divergent in determining when strict liability applies. The attempt to identify some activities that are, by consensus, abnormally dangerous and then to reason by analogy, flounders with lack of consensus about what activities are abnormally dangerous and any basis for making an appropriate analogy. The blasting cases are thought of as “paradigm case[s],”⁵² but there is no consistent pattern in their outcomes: sometimes strict liability is applied, sometimes it is not.⁵³ And reasoning by analogy is fruitless if one cannot identify the basis on which analogies are to be

51. See, e.g., Hylton, *Theory & Restatement*, *supra* note 17, at 1417 (“Economic theory seems as a general matter to suggest that we should see strict liability as the general rule with negligence appearing as the exception in certain instances.”); Jones, *supra* note 10 (stating carefully, however, and relaxing the strict liability rule when the plaintiff considerably contributes to the harm or when the strict liability rule would unduly increase transaction costs); Rosenberg, *supra* note 16, at 1217 (“[I]n short, courts do not need to choose between rule regimes because strict liability works in all cases: it will be effective when it is needed and do no harm when it is not.”).

52. *Correa v. Curbey*, 605 P.2d. 458, 459-60 (Ariz. Ct. App. 1979); *Stockbridge Cmty. Ass’n v. Star Enter.*, Law No. 108514, 1992 WL 884453, at *2 (Va. Cir. Ct. 1992).

53. See *infra* text accompanying notes 131-68.

drawn, which is not possible if the concept of residual risk is not first defined.

B. *Proposition Two: Liability Should Not be Imposed When The Defendant Has Made Reasonable Activity-Based and Care Decisions*

Given the role of activity-based decisions in contributing to harm from accidents, it would be logical to argue that strict liability ought to be the general background rule, because only strict liability influences both due care and activity-based decisions, while negligence liability is believed not to.⁵⁴ Why not adopt a regime—strict liability—that influences both levels of care and activity-based decisions rather than a regime that influences only levels of care—negligence—and is sometimes supplemented by strict liability to regulate activity-based decisions?⁵⁵ Under this view, if activity-based decisions were broadly implicated in accident cases—just as quality-of-care decisions are—then it would make sense to adopt the regime that influenced both quality-of-care decisions and activity-based decisions.

This position raises two problems. In this section I focus on the first problem: strict liability imposes liability on those who have made reasonable activity-based, and due care, decisions and is thus overly broad. In the next section, I focus on the second problem: that we often do not want to make judgments about an actor's responsibility for deciding how frequently to undertake an activity.

The problem addressed in this section is that even if strict liability could be justified because it imposes liability

54. See Jones, *supra* note 10.

55. These considerations are not the only ones that affect the choice between negligence and strict liability, of course. Strict liability has the advantage of making up for defects in the negligence regime because it imposes liability when the defendant has failed to exercise due care but the plaintiff does not have access to the information necessary to demonstrate that fact. GEISTFELD, PRODUCTS LIABILITY, *supra* note 10, at 25 (justifying strict liability on the basis of "evidentiary problems" in the negligence regime); Geistfeld, *Enterprise Liability*, *supra* note 10, at 633-36. It would be a mistake, however, to put too much emphasis on the possibility of false negatives under the negligence regime. As I argue below, the reasonableness standard is fully flexible enough to minimize false negatives. See *infra* text accompanying notes 127-30.

on those who make unreasonable activity-based decisions, it has the defect of over-breadth: it also imposes liability on those actors who make reasonable activity-based decisions—that is, those not at fault. As I now discuss, we have no convincing theory that explains why it is just to require one who is not at fault to compensate another for harm caused, which is what strict liability does, and plenty of reasons to avoid imposing liability without fault.⁵⁶

The analysis in this section is framed by a simple point. The appeal of the reasonableness standard, when we use it, is that it embodies a theory of non-responsibility that is consistent with both the corrective justice and the economic approach to torts. Applying strict liability to a defendant who has made reasonable quality-of-care and reasonable activity-based decisions takes tort law in a different, no-fault direction. But if we endorse a moral and economic theory of limited responsibility in general accident cases, why would we jettison that theory in those cases that we put in the “strict liability” category? After all, the negligence regime, which encompasses a theory of responsibility for fault, necessarily also encompasses a theory of non-responsibility—namely, the theory that an actor should not be responsible for the harms the actor causes when the actor has no practicable control over those harms. This notion of the limits of human responsibility also undermines the strict liability regime unless we have a convincing justification for allocating risks, through private law, that are beyond human control.

Fault-based theories, whether from the corrective justice or economic viewpoint, emphasize that legal and moral responsibility in a person or organization must be centered on the decisionmaking autonomy exercised by the person or organization. This focus on decisionmaking autonomy as the source of moral and legal responsibility defines both when responsibility should be found and when it should be withheld.

Core to this understanding is the notion that imposing liability when an actor has had no opportunity to make a different decision is itself unjust. From the corrective justice standpoint, imposing liability in this circumstance would

56. The thought is an old one. See, e.g., Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916).

deny the agency of the defendant. Here the modern corrective justice scholars join Oliver Wendell Holmes. Holmes noted that "the requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability."⁵⁷ Weinrib echoes this in Kantian terms: "The injurer can be liable only for action that flows from the capacity for purposiveness. Such action characterizes the injurer's status as an agent, and differentiates the injurer from an irresponsible force of nature An agent, therefore, ought not to be held liable for being active."⁵⁸ Similarly, Jules Coleman has convincingly shown that any link—other than choice—between act and harm is an insufficient basis, by itself, for imposing liability under corrective justice.⁵⁹

Similarly, a central insight of the economic approach to torts—fully consistent with the corrective justice insight just described—is that it is impossible to force people to make more than reasonable decisions. The law can make people pay for harms, but it cannot make them change the way they exercise their freedom of choice in order to be more than reasonable. The rule of strict liability internalizes the cost of harm and imposes a price on activity, but it does not induce anyone to exercise more care than is reasonable in the circumstances. It is always cheaper to pay the judgment rather than to change the reasonable decisions that have been made—because once a

57. O. W. HOLMES, JR., *THE COMMON LAW* 95 (1881).

58. WEINRIB, *supra* note 6, at 181-83; see also ALAN BRUDNER, *THE UNITY OF THE COMMON LAW* 190 (1995); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND LUCK* 50-51 (1999). For an argument that human agency supports the imposition of strict liability, see John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY* 111, 113 (Peter Cane & John Gardner eds., 2001). Ultimately, an appeal to human agency to determine whether strict liability should be preferred to negligence liability begs the question of which aspects of human agency ought to be the source of responsibility. After all, the decision to go for a drive is an act of human agency, as is the decision to drive recklessly and there is no *a priori* reason to believe that one act of human agency ought to be the source of responsibility and the other not. My proposal—to focus on the aspect of human agency that is unreasonable in order to assign responsibility—honors the concept of human agency, but avoids the question-begging.

59. COLEMAN, *supra* note 6, at 342-45.

reasonable decision is made the expected harm is less than the cost of more precautions. To penalize the reasonable act runs the risk of losing the benefits of action without reducing the costs of the action.⁶⁰

These two schools of thought point in the same direction. It is morally unwise to impose liability when a person has made a reasonable choice and impossible practically to alter the standard of care by imposing liability.⁶¹ Fault is the only relevant moral and practical measure of individual and organizational responsibility.

This not only explains why the fault-based negligence rule predominates in accident law; it also suggests that the imposition of liability when an actor has made reasonable quality-of-care and activity-based decisions is inconsistent with theories of responsibility. Just as there are positive reasons for not imposing liability on a person who has acted reasonably in terms of their quality of care, there are positive reasons for not imposing liability on a person who has made reasonable decisions about the frequency, location, method, or timing of activity. Imposing liability in these circumstances has no positive impact on human behavior; it can only induce people to refuse to take risks that benefit society; and it makes a person responsible for conditions over which the person has no control. A rule of strict liability imposes costs on those who have acted reasonably—as to quality-of-care and activity-based decisions—and it has a negative impact on the values that freedom from liability protects.⁶²

60. Oliver Wendell Holmes expressed this thought as well: “[T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.” HOLMES, *supra* note 57, at 95.

61. In terms that are sometimes used, imposing liability on a person who has made reasonable due care and activity-based decisions is like a tax. See, e.g., Hylton, *Theory & Restatement*, *supra* note 17, at 1417 (arguing that liability for unreasonable decisions is not a tax, impliedly accepting the notion that liability on any other basis is a tax). The relevance of this is that a liability rule that functions as a tax would require a different kind of justification than a liability rule that is imposed because of fault.

62. In this connection, it is surprising to see scholars who view tort law in deterrence terms proclaim that strict liability “will be effective when it is needed and do no harm when it is not.” Rosenberg, *supra* note 16, at 1217. Once an actor has made reasonable due care and activity-based decisions, imposing liability—which, after all, punishes bad luck—will undoubtedly chill productive

Indeed, once we put loss distribution theories aside, we have no general theory of torts that supports liability without fault.⁶³ Those following law and economics endorse strict liability only because they believe—mistakenly—that the negligence standard is inadequate to induce appropriate activity-based decisions. Corrective justice scholars favor strict liability only because of perceived evidentiary problems in the fault-based regime, or as an extension of rules of inference that make it easy to prove fault. They provide no normative theoretical support for no-fault liability.⁶⁴

Even theories that purport to be no-fault theories—those that focus on an activity rather than on the way the activity is undertaken—turn out, on analysis, to revolve around an inquiry into the injurer's fault. Richard Epstein's proposal that causation can serve as a moral basis for holding one responsible for harms⁶⁵ does not, in fact,

investment. Liability in those circumstances essentially says that one will be punished for taking chances, even after one has done all that is possible to minimize risk. That is a tax on risk-taking, not on faulty conduct, and one who must pay a tax for his bad luck is likely to avoid exposing himself to the risk of bad luck. Productive activity only occurs when the returns from good luck are likely to outweigh the losses from bad luck, and enhancing the losses from bad luck can only reduce productive activity. For a model that emphasizes the inefficiency of imposing liability on risk averse actors who have taken all reasonable care, see Marilyn J. Simon, *Diagnoses and Medical Malpractice: A Comparison of Negligence and Strict Liability Systems*, 13 BELL J. ECON. 170 (1982).

63. We must distinguish descriptive from normative theories; a description of strict liability that does not, in fact, justify it is not a theory of strict liability. See, e.g., Gregory C. Keating, *Property Right and Tortious Wrong in Vincent v. Lake Erie*, ISSUES LEGAL SCHOLARSHIP, Oct. 2005, at 1, 4, available at <http://www.bepress.com/ils/iss7/art6> (arguing that in some cases those who benefit from the activity must also absorb the costs of the activity—which is based on the justice of proportionality—but failing to provide a test for when the benefits theory applies and when it does not).

64. In other words, the risks of any human endeavor can be broken down into three constituents: those risks that can be addressed with due care, those risks that can be addressed by making reasonable activity-based decisions, and those risks—residual—that cannot be reduced by human ingenuity and investment. Any theory of strict liability that purports to go beyond a theory of the inadequacy of the negligence regime, which applies to all human decisions, must provide a theory for allocating the residual risk to the injurer rather than the victim. This Article has given the argument against such a theory.

65. Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) [hereinafter Epstein, *Defenses & Subsequent Pleas*]; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL

abandon fault except in several cases that Epstein believes were wrongly decided.⁶⁶ Instead, Epstein offers a rearrangement of the traditional elements of negligence that would embed fault concepts in the causation element, built around the following general paradigm: "If A caused B's harm, then A should be responsible for B's harm." His careful analysis of the contents of various forms of this causal statement relies on considerations that are drawn from a fault-based analysis. Thus, he says, A cannot "cause" harm if A acted non-volitionally, which implies an inquiry into whether A made a choice,⁶⁷ which is the focus of fault-based theory. And his scheme relies upon several gambits that imply an inquiry into A's fault: even if A caused harm, A is allowed to provide an excuse for doing so,⁶⁸ and A is responsible for dangerous conditions but not for "mere" conditions that cause harm.⁶⁹ His theory—really a theory of causation, not strict liability—is an ingenious way of getting around problems of proximate cause and gaps in the theory of negligence, but it does not move tort law away

STUD. 151, 152 (1973) [hereinafter, Epstein, *Strict Liability*]. In recent years, Epstein seems to be moving away from his own theory, although only in a way that makes the theory's relationship to fault based analysis even clearer. Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 1-2 (1996); Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653 (1987).

66. Epstein clearly would reverse the outcome in two cases that allow a defendant to use reasonable force to protect himself or his property, preferring to distribute the loss from the victim to the self-serving defendant. *Morris v. Platt*, 32 Conn. 75 (1864) (explaining that when defendant reasonably protects himself from an attack by third-persons, the bystander he shot in the process may not recover); *Courvoisier v. Raymond*, 47 P. 284 (Colo. 1896) (explaining that it was error to instruct jury that, unless defendant shot plaintiff during an assault on defendant, verdict should be for plaintiff). To Epstein these cases appear to be inconsistent with *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910), which held that one who reasonably uses another's resources is privileged to do so but must pay for the resource. The other decision that he intimates might be better addressed under causal terms, *Bolton v. Stone*, can be fully addressed in the negligence regime. See *infra* note 111 and accompanying text.

67. Epstein, *Strict Liability*, *supra* note 65, at 166.

68. *Id.* at 168.

69. *Id.* at 179. Under this reading, leaving a knife in a kitchen drawer would be a "mere" condition, while leaving a knife in a kitchen drawer knowing that a house guest was likely to use it to inflict harm would be a "dangerous condition." This builds an analysis of fault into the distinction between a "mere" condition and "dangerous conditions." *Id.*

from an inquiry into whether the injurer's conduct was blameworthy.

George Fletcher's theory of reciprocal risk⁷⁰ or dominance⁷¹ appears to base liability on whether the injurer imposes non-reciprocal risks on the victim. Yet in determining whether a risk is non-reciprocal we have no choice but to examine the context in which the defendant made decisions, so that building a reservoir is non-reciprocal when done in coal country but not when done in locations where there are plenty of reservoirs.⁷² This too implies that something about the choice of location is faulty.⁷³ Moreover, the theory itself does not help us distinguish reasonable risks—that, by definition are reciprocal—from unreasonable—non-reciprocal—risks, and we can support the distinction only by supplying some basis for comparing the risks and benefits of the decisions that were made—a fault based inquiry.⁷⁴

The absence of a convincing theory of responsibility without fault emphasizes the injustice of imposing liability without fault. The subject of the law is human behavior and when we cannot trace harm to human behavior, any imposition of liability would make humans responsible for the residual risk that amounts to forces of nature. While there may be good reasons to relieve the victim of the burdens of harm from such forces, there is no warrant to make another responsible for those forces simply because

70. Fletcher, *Fairness & Utility*, *supra* note 1, at 537.

71. Fletcher, *Corrective Justice*, *supra* note 1.

72. Fletcher, *Fairness & Utility*, *supra* note 1, at 546.

73. Fletcher is imagining that building a reservoir in coal country imposes a non-reciprocal risk, while building it in textile country (where there are many mills, dams, and reservoirs) makes the risk reciprocal. Yet, a reservoir over a coal mine in textile country would still be a non-reciprocal risk as to the coal mine, under Fletcher's definition, so the existence of other reservoirs in that area would not reduce responsibility to the coal mine under the non-reciprocity theory. The distinction between locating your reservoir in coal country rather than textile country is real, but it has to do with the decision about the location of activity. See *infra* text accompanying notes 131-38. In Fletcher's terminology, locating the reservoir in coal country imposed a non-reciprocal risk because it was an unreasonable location for that activity, while locating the reservoir in textile country was not. Fletcher, *Fairness & Utility*, *supra* note 1, at 546. This, of course, is a fault-based concept.

74. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 313-21 (1996).

the other set them in motion—unless setting them in motion is itself faulty. Strict liability that is applied to reasonable choices, therefore, does an injustice.

C. For Normative Reasons, Liability Should Not be Imposed on Many Frequency Decisions

Although the strict liability standard is overly broad, perhaps this over-breadth is relatively small. Perhaps unreasonable activity-based decisions are implicated in most accidents, so that the injustice from the over-breadth is tolerable. We cannot fully assess my argument about strict liability's over-breadth until we have assessed the relationship between frequency level decisions and responsibility for accidents.

Advocates of strict liability believe that decisions about the frequency of activity are implicated whenever accidents occur. It is commonly thought, for example, that if we take the relationship between the frequency of activities and accidents seriously we should examine, when a person has an accident, how often a person goes to the store, even if they drive carefully on every trip to the store. If the decision about how often to go to the store is relevant to tort law, then strict liability has an advantage over negligence liability—namely, the information needed to assess the utility of a trip to the store is difficult to acquire and evaluate in a negligence regime, while under the strict liability standard courts need not make that assessment. The actor who is faced with strict liability will automatically forego trips to the store where the benefits of the trip are outweighed by the possibility of having an accident while driving with due care.

But it is a mistake to believe that frequency level decisions are of general concern in accident cases. In fact, as I argue in this section, frequency level decisions are often *not* implicated in accident cases because we do not want to make judgments concerning the actor's decision about how frequently to undertake an activity. We do not want, in other words, to make judgments about how often a person goes to the store when determining his responsibility. Frequency level decisions are simply not generally relevant

to the calculus of fault.⁷⁵ Accordingly, we cannot justify the over-breadth of strict liability as a way of inducing more reasonable frequency level decisions; to the contrary the fact that most frequency level decisions are irrelevant to tort law suggests that the over-breadth of strict liability is significant. It is precisely because we do not want people to have to assess the value of their trips to the store that we apply negligence, not strict liability, to automobile driving.

Those who assume that frequency level decisions are relevant to accident law have confused the empirical with the normative. It may be true that accidents increase with the frequency of an activity, but that does not mean that frequency decisions are a concern of tort law, for the goal of tort law is not to reduce accidents but to reduce unreasonable accidents—that is, accidents that can be controlled by reasonable human effort.⁷⁶ Tort law is

75. The reader may object that the whole purpose of strict liability is to impose liability without fault, making my fault based analysis irrelevant. But that misses the context of my analysis. I argued in the previous section that imposing liability without some cogent concept of fault or responsibility is unjustified. Here I take aim at those scholars—primarily law and economics scholars—who believe that strict liability serves to curb faulty frequency level decisions that cannot be apprehended by negligence liability. I argue that they simply have not thought hard enough about the values that underlie the fault concept. We cannot say that the purpose of the law is to provide an incentive for actors to take reasonable precautions without also providing a normative basis for evaluating the value of precautions. If it is important to society that epileptics have the freedom to drive or that people not consider the legal consequences of their choices about how often to get in their car, those values must be taken into account before we can determine what precautions are relevant to incentives. My argument that many frequency level decisions should not be the source of legal responsibility is simply a specific application of the argument that it is unjust to impose responsibility on the exercise of personal freedom that is reasonably undertaken.

76. The same argument can be framed in terms of externalities. It is true that choices about how frequently to drive impose external costs on others—because the more miles on the road the greater the likelihood of an accident. But these external costs are offset by the external benefits of the freedom to drive—a universal benefit—so that frequency decisions do not clearly impose net costs on society. Professor Hylton has made a similar point by recognizing that when the external benefits and costs of an activity are relatively equal the law has no interest in intervening to change frequency level decisions. Hylton, *Theory & Restatement*, *supra* note 17, at 1420; Hylton, *Missing Markets*, *supra* note 17, at 984-86. The relative balance between external costs and benefits of an activity suggest that the actor making the frequency decision has thought reasonably about the impact of the decision on others. As an example, the frequency with which a bus uses the road is likely to balance the probability of

concerned primarily with providing a normative basis for determining when to intervene in social arrangements by providing a remedy when there is a sufficient link between the injurer and the risk that another faces. But the "sufficient link" assumes a normative basis for assessing human behavior.

In fact, a normative understanding of accident law shows that most frequency level decisions are not relevant when determining legal liability. When we determine whether a person is responsible to others for harm in an accident, we are asking whether the person imposed undue risks on society by preferring her own legitimate interests over the legitimate interests of others in a way that unreasonably denigrates the interests of others.⁷⁷ This determination necessarily requires the law to make a qualitative determination about the interests of the defendant and those whom the defendant might potentially injure. The assessment of interests is a normative—not an empirical—inquiry, for it requires a determination of the values that are important to society. When the interests of the individual are trivial in light of conflicting interests, the law makes them subservient.⁷⁸ When the interests of the individual are also of value to society, they are given great weight in determining what is reasonable and what is not. The individual becomes the beneficiary of a determination

an accident—an external cost—with the probability the passengers will enhance the value of stores along the route—an external benefit. When that occurs, the frequency of the bus's trips is not likely to justify judicial intervention. Interestingly, this notion that social benefits and costs of an activity may be equal is related to the corrective justice notion that when risks are reciprocal, liability may depend only on the care exercised. See Fletcher, *Fairness & Utility*, *supra* note 1, at 543-56 (noting that the risk that the bus imposes on stores along the route is reciprocated by the risk that stores impose on buses; the bus and the stores are interdependent beneficiaries of each other's success).

77. See generally Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996); Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES L. 105 (2003).

78. For example, an interest in going fast—and thereby imposing undue risks on others—is given no value in determining whether going fast is unreasonable, unless, of course, it is in pursuit of a broader interest, such as taking someone to the hospital. And an interest in saving money—say, by omitting to invest in reasonable precautions—is ruled out by the fact that failure to invest in reasonable precautions prefers one's own welfare to the welfare of another.

that a certain mode of acting reflects values that are important to social life.

We have already seen this dynamic at work in the case of an epileptic who imposes a greater than normal risk on society even though he reasonably controls his disability.⁷⁹ Society tolerates this reasonable risk, and therefore does not impose strict liability, precisely because we do not want the defendant with this disability to have to worry about legal liability every time he gets in his car. To impose strict liability because of this disability—or “defect”—would be to deny the person the freedom of movement that is an essential part of human expression of capability. Instead, we affirm that, except in special circumstances,⁸⁰ the frequency with which the epileptic drives is not relevant to the determination of liability.

More generally, freedom of movement and freedom of travel suggest that the law ought not intervene, in general, when individuals decide how frequently to do an activity that can be done with reasonable care.⁸¹ Here, the relevant

79. See *supra* note 31 and accompanying text.

80. It will be recalled that if the epileptic driver decided to drive a taxi for a living, society might well be justified in saying that the choice of that profession was unreasonable, given the frequency with which he would then be on the road and the other options the defendant would have to express his individuality. See *supra* note 31 and accompanying text. That is, frequency level decisions might be relevant, but when they are they can be addressed under the reasonableness standard.

81. The Restatement (Second) of Torts recognizes this by providing that:

The law attaches utility to general types or classes of acts as appropriate to the advancement of certain interests rather than to the purpose for which a particular act is done, except in the case in which the purpose is of itself such public utility as to justify an otherwise impermissible risk. Thus, the law regards the free use of the highway for travel as of sufficient utility to outweigh the risk of carefully conducted traffic, and does not ordinarily concern itself with the good, bad, or indifferent purpose of a particular journey. It may, however, permit a particular method of travel which is normally not permitted if it is necessary to protect some interest to which the law attaches a preeminent value, as where the legal rate of speed is exceeded in the pursuit of a felon or in conveying a desperately wounded patient to a hospital.

RESTATEMENT (SECOND) OF TORTS §291 cmt. e (1965). As Stephen Gilles recognized, this “is a ruling on the *merits* rather than a ruling that activity-level claims lie outside the ambit of negligence law.” Gilles, *supra* note 15, at 340; see also, RESTATEMENT (SECOND) OF TORTS § 293 cmt. b (1965) (“A car

determination is whether the mode of acting or the mode of decisionmaking is one that society would endorse as important to the interrelationships that make up society or that are important for the individual acting in a social setting. Society endorses the freedom of mobility of the person subject to epileptic seizures; we do not want a person's physical disability to block access to a productive life and we know that if we were in that person's position we would not want our physical disability to be attended by a legal disability—provided that we acted reasonably in light of the disability. And we trust decisions that are embedded in social systems that protect against abuse of the autonomy the law values. By this reasoning many frequency level decisions are socially benign.⁸²

Accordingly, when a person decides how frequently to go to the grocery store, we do not want or expect that decision to be subject to social oversight through the tort system. For one thing, we do not want that person to have to weigh the costs and benefits of that trip from a societal perspective to determine whether one more trip is reasonable. We preserve the autonomy of a person to make a private assessment of the costs and benefits of one additional trip because to interpose societal oversight on

may be driven at fifteen miles an hour through a city street upon the least important of errands.”).

82. This general point is related to the difficulty of proving that the harm was caused by frequency level decisions. Professor Gilles has pointed out that even if a plaintiff could convince a court that a railroad had run too many trains, or that the defendant had gone to the grocery store too frequently, the plaintiff would have difficulty showing that the *unreasonable activity* caused the harm. Gilles, *supra* note 15, at 333. He offers this as a reason to adopt strict liability. But the difficulty of proving causation is a reason to have a no-liability regime for those decisions. The causation difficulty reflects the fact that ordinary people do not make decisions about how often to do something with a view that the decision might “cause” an accident, in the sense of triggering an accident that otherwise would not occur. If you said to the person on the street that their trip to the store caused the harm in an accident because it was an unnecessary trip, they would wonder what concept of causation you were using. The fact that causation would be hard to prove simply demonstrates that when people make decisions about how often to go to the store they are generally unconcerned with safety matters and therefore would not understand that they had caused any harm by the decision in the event of an accident. Causation is a part of individual decisionmaking related to risk only when the decision being made is thought to have an influence on the risk or outcome. People would understand that driving too many miles and becoming tired causes an accident, but not that making an extra trip to the store causes an accident.

that decision would unduly burden the decision-making autonomy of the person. This conclusion reflects the way people normally think about such choices. When we decide whether to make a trip to the store, we normally think not of the risk of the trip but of the time and effort of the trip—compared to the goal of the trip.⁸³ We do not want the law to be imposing factors on decisionmaking that are not an integral part of the decision when made outside of the law.⁸⁴ This congruence between common practice and the law reinforces the normative basis of the law.

For this reason, engaging in an activity—that is, having a frequency level above zero—is rarely an occasion for liability in negligence. Negligence law is replete with instances in which engaging in an activity—even an

83. As Stephen Gilles has noted,

[the] asymmetry between the courts' willingness to evaluate 'high-risk' claims—claims that an actor negligently engaged in an activity that is normally safe but was unsafe on a particular occasion—and their willingness to evaluate 'low-utility' claims—challenges to an actor's decisions to engage in an activity on the grounds that, although the activity's utility normally outweighs its costs, on the occasion in question its utility was so low as to require a finding of negligence.

Gilles, *supra* note 15, at 321. This is noticing that courts will evaluate risky driving but not the claim that the trip should not have been made. That is because it would unduly impinge on a person's autonomy to inquire into low utility claims; a finding of unreasonably low utility would disable a person from making these choices. Moreover, Professor Gilles also noted that increased frequency of activity is often associated with diminishing marginal utility rather than an increase in the risk of the activity. *Id.* at 335. Because of this, even if an excess of risk over return might occur in a low-utility activity, the actor is likely to curtail the activity even if the law does not make it the occasion for liability, merely because the return to the activity decreases as frequency increases. That makes the need for legal intervention that much less important.

84. One can see how the characteristic of ordinary decisionmaking differentiates decisions about the quality of care from decisions about activity-based decisions. When deciding how fast to drive, we normally take into account safety considerations, in our own interests if not in the interests of others. More generally, decisions about quality of care are more likely than decisions about the frequency of an activity to involve considerations of the risk of accidental harm. Under a value-driven negligence law that reflects values actually adopted by people in their lives, it is therefore not surprising that frequency level decisions are often not the source of responsibility while quality-of-care decisions are. We can note the desire to avoid having courts estimate the "practically unknowable" benefits that parties derive from their everyday activities, STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 25 (1987), but recognize that the issue never comes in a way that cannot be easily litigated.

unlicensed or illegal activity—is not the source of liability when harm results.⁸⁵ And we have few instances in which the appropriate frequency level of an activity is zero.⁸⁶ As a general category, frequency level decisions are not the concern of tort law.

Could it be that frequency level decisions have unique applicability to enterprises? After all, businesses as well as individuals often decide how frequently to use the highways and enterprises might well increase risks by shipping with unreasonable frequency. Of course, when businesses make unreasonable decisions about where or how to do business they should be subject to liability, which is the central focus of cases that impose negligence liability on enterprises. And the frequency with which enterprises ship products might be relevant to safety concerns.

Yet it is not clear why frequency decisions by enterprises should be a general concern of the law because it is not clear why the market does not force enterprises to make reasonable frequency level decisions. Why, for example, would an enterprise send out trucks with unreasonable frequency? Ordinarily, aside from special cases that I discuss below, an enterprise has nothing to gain by overusing the transportation infrastructure, because using the transportation system costs money and the enterprise will normally want to avoid that when the expense yields no offsetting benefit. In other words, provided that the competitive system is functioning well, markets impose a kind of reasonableness constraint on the frequency of activity, putting pressure on the enterprise to reduce the frequency of transportation to the minimum necessary to meet the needs of customers. Unless there were a reason to believe that an enterprise could make money by sending out trucks more frequently than would be reasonable from a safety standpoint,⁸⁷ decisions that

85. This is true, for example, when the defendant should have been, but was not, licensed to practice an activity and harms someone while engaging in that activity. See, e.g., *Brown v. Shyne*, 151 N.E. 197 (N.Y. 1926) (addressing the liability of an unlicensed chiropractor). Moreover, it is commonly assumed that a kidnapper who gets in an accident while driving carefully after the kidnapping is not responsible for the harm from the accident, even though his activity level should have been zero.

86. See *infra* text accompanying notes 98-100.

87. Exceptions can be found in companies that charge customers more for

enterprises make about transportation are likely to be both cost effective—from the enterprise standpoint—and reasonably safe. Under these assumptions, the frequency with which an enterprise sends out trucks is not of general importance when we think about an enterprise's responsibility for accidents in tort.⁸⁸

The only cases in which an enterprise is not likely to make socially appropriate frequency decisions, and thus the only cases in which intervention is called for, is when firms are not forced by the market to minimize their costs. If an enterprise can increase its profits by increasing risk to others—say by requiring suppliers to ship in their half-empty trucks—the concern for unreasonable risks may be real. Those instances are generally easy to observe and assess under the reasonableness standard.⁸⁹

I am not arguing, of course, that frequency level decisions are never relevant when courts determine responsibility—only that we cannot assume that frequency level decisions are relevant to legal responsibility, and that in the run-of-the-mill accident case, frequency level decisions are not likely to be relevant. But we must notice another characteristic of frequency level decisions that bears on the

each vehicle they send on the road. For example, cabs sometimes refuse to take multiple parties to the same destination, preferring rather to make each party take a separate cab. Also, one could imagine a messenger service that sent packages out in more vehicles than necessary in order to charge senders more for each delivery. These examples of market failure provide a basis for legal intervention, but because they are easy to identify and assess, they do not provide a basis for strict liability. They can be addressed under the negligence regime.

88. By contrast, an enterprise often has a private objective that diverges from the public interest when it comes to taking due care. The enterprise profits if its carriers go unreasonable fast and do not get in an accident, but society benefits if they go at a reasonable speed. This divergence between private and public interest makes the question of due care an essential inquiry to help align the enterprise's objectives with social objectives.

89. It is relatively easy for plaintiffs to recognize the counter-examples and to sue the defendant for negligence. For example, if a monopolist buyer insisted that its supplier deliver in half-empty trucks at rates that would be charged for deliveries in full trucks, a claim that this induced too frequent use of the roads—from a safety standpoint—could be brought by one injured in an accident involving one of the deliveries. Because these are isolated, easily recognized situations, we need not fear, with Shavell, that allowing courts to intervene in such situations would also induce courts to begin mimicking authorities that devise production schedules in a centrally planned economy. SHAVELL, *supra* note 84, at 50-51.

role of strict liability—namely, when frequency level decisions are relevant we can apprehend their relevance under the negligence standard. Indeed, it is common to do so under existing law. When a person is in an accident because the person is overly tired from driving too long, we do not call this a frequency level case, but we have no problem saying that the person has acted unreasonably. And when a person dumps enough chemicals in one place to create a hazard we need not call this a frequency level case in order to impose liability; we simply treat it as a case of negligence.

In short, we do not want to examine frequency level decisions in every accident case, and certainly not in the case of individuals and businesses going about their activities in normal ways. Instead, we can make a normative determination about when frequency level decisions are relevant and when they are not by seeing whether the law *should*—in light of freedom, autonomy, and market factors—care about frequency level decisions. And when frequency level decisions are relevant to the determination of fault, they can easily be identified and addressed under the reasonableness regime. As a result, we cannot justify strict liability as necessary to interdict frequency level decisions. Because a rule of strict liability would impose responsibility for harm even in cases where the activity ought not be the basis of liability, a rule of strict liability is, to that extent, overly broad. Instead, courts should examine frequency level decisions in particular contexts in which the plaintiff can show that these decisions meet the standard of unreasonableness.

D. *Courts Have the Capacity to Assess the Reasonableness of Relevant Activity-Based Decisions*

Thus far I have argued that the strict liability standard is overly broad because it imposes liability on those who have made reasonable activity-based decisions and because it imposes liability when we would not want a person to be responsible for frequency decisions. Should we nonetheless rely on a strict liability rule—despite its breadth—because activity-based decisions would otherwise not be subject to judicial oversight? I think not, for one simple reason: courts operating in the negligence regime are fully capable of determining the reasonableness of the activity-based

decisions that are relevant for determining fault.⁹⁰ If we subject all relevant decisions—quality-of-care and activity-based decisions—to reasonableness standards, we fully define the appropriate scope of responsibility for injuries that justice requires.

1. *Because Activity-Based Decisions Are Susceptible to Comparative Analysis, They Can be Assessed under the Reasonableness Standard.* As we have seen, it is worthwhile to distinguish between frequency level decisions and other activity-based decisions because the former are often not relevant to an actor's responsibility.

a. *Relevant Frequency Level Decisions.* Where the frequency of the activity has normative relevance, determining the reasonableness of frequency levels is not unduly difficult. There are two general situations: cases where the severity of the harm increases with frequency and cases where the appropriate activity base is zero.⁹¹

The severity of harm increases with frequency, for example, where dumping waste does not pose a threat at low levels but repeated dumping of wastes increases the amount of harm.⁹² In this kind of case, the proof of the level of dumping at which harm occurs is difficult, but it is not beyond the information capacities that courts normally use. Moreover, when harm occurs of the type that would normally occur only if the activity were repeated too often, the existence of harm can itself be evidence that the reasonable activity levels had been exceeded. The problems of proof are hardly insurmountable.⁹³

90. The general point was made in Gilles, *supra* note 15, at 320-21, and Donohue, *supra* note 26, at 1059-60.

91. We earlier saw that a defendant who is subject to epileptic seizures might be found to have acted unreasonably by deciding to become a taxi driver, which is essentially a frequency level decision. See *supra* text accompanying notes 34-37. This can be considered a special kind of frequency level decision, but, as shown above, it is not difficult to analyze the reasonableness of this decision.

92. See, e.g., State Dep't of Env'tl. Prot. v. Ventron Corp., 468 A.2d 150, 154, 157 (N.J. 1983) (finding strict liability for dumping mercury wastes in water for over fifty years).

93. Courts in negligence cases routinely modify the burden of proof to take into account the difficulty of proof in light of what probably happened. For example, where the defendant prescribed an overdose—clear activity-based

The second class of cases—where the activity ought not be carried out at all and no alternative exists—is more theoretical than real. When the drafters of the Restatement (Third) of Torts: Products Liability looked at this issue they concluded that few products fit this category.⁹⁴ Nonetheless from a theoretical standpoint it is possible that an activity's appropriate frequency level is zero.⁹⁵ This would be true where the value of the activity is so low and the risks of the activity so great that the activity ought to be prohibited. This too is achievable under the negligence standard, for the negligence standard allows one to conclude that it is unreasonable even to engage in the activity.⁹⁶ Although this

negligence—and the victim developed pulmonary hypertension, it was not clear that the overdose—the unreasonable activity—caused the harm, or whether the harm would have been caused by a regular dose. *Zuchowicz v. United States*, 140 F.3d 381, 387-91 (2d Cir. 1998). Nonetheless, the court easily relaxed the burden of proving causation in order to allow the finder of fact to make the causal determination based on their best guess about what would have happened without the overdose. *Id.*

94. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. e, at 22 (1998) (stating that, for some classes of products, “the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product”). The Restatement supposes that toy guns that shoot high velocity pellets, exploding novelty cigars, and lawn darts might fall into this category. *See, e.g., Aimone v. Walgreen's Co.*, 601 F. Supp. 507 (D.C. Ill. 1985) (providing such an example with lawn darts).

95. The Restatement (Second) of Torts gives this example:

A reasonable man would recognize that there is an inescapable risk in driving down a narrow and ill kept mountain road, winding along precipices unguarded by walls or railings, particularly if rain, snow, or ice has rendered the road slippery. The mere use of such a route under the circumstances described may be negligent unless the utility of the route is very great.

RESTATEMENT (SECOND) OF TORTS § 297 cmt. a (1965).

96. This was recognized, for example, in the Restatement (Second) of Torts, where it was said that: “If the utility of the activity does not justify the risk it creates, it may be negligence merely to carry it on, and . . . [strict liability] is not then necessary to subject the defendant to liability for harm resulting from it.” *Id.* § 520 cmt. b. The Restatement (Third) of Torts: Liability for Physical Harm admits that:

If all the risks entailed by an activity even when reasonable care is exercised outbalance all the advantages that the defendant and all others derive from the activity, it may be unreasonable and hence negligent for the defendant to carry on the activity at all, or at least to

is an uncommon conclusion, that is because most accident cases involve products and activities with some benefits.

b. *Relevant Method, Timing, and Location Decisions.* Most relevant activity-based decisions involve a defendant's choice of location, method, or timing of operations. Because these are comparative choices, they are subject to the kinds of information processing that are used in quality-of-care negligence decisions.⁹⁷ The defendant is faced with at least two options for conducting its activities and need only choose the most reasonable one—the option that achieves its goals with the least risk to society. A defendant might be faced with two routes to get hazardous wastes through a city, or two times at which it might perform an activity, or two methods of removing a tree. A reasonable person would make the choice that minimizes the expected harm in light of the benefits of each method.

Decisions like this are clearly susceptible to the kinds of proof that courts use to decide whether the defendant acted reasonably.⁹⁸ A court's quality-of-care decision is essentially

carry it on at the particular location. However, if defendant's decision to engage in the activity is in fact negligent, the issue of the defendant's strict liability recedes in importance.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20(a)-(b), at 280 (Proposed Final Draft No. 1, 2005). Courts have used the reasonableness standard in this way. *See, e.g.,* Moning v. Alfano, 254 N.W.2d 759 (Mich. 1977) (allowing a jury to determine whether marketing slingshots to children was unreasonable). Although not all courts agree. *See, e.g.,* Bojorquez v. House of Toys, Inc., 133 Cal. Rptr. 483, 484-85 (Cal. Ct. App. 1976) (holding that retailer and wholesaler of slingshot could not be found negligent when slingshot was used to injure child).

97. *Cf.* Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139, 141 (1989) ("The untaken precaution is the true center of specific negligence analysis . . ."). In other words, the plaintiff can simply allege that a different method, timing, or location of the activity is an untaken precaution that made the activity-based decision unreasonable. It is no objection that "specifying possible options does not seem to be the comparative advantage of judges." Rosenberg, *supra* note 16, at 1216. It is, of course, up to the plaintiff to give the judge and jury information about the reasonable options that were ignored, and to choose a level of specificity that recognizes the kinds of decisions that the defendant made.

98. Indeed, it is difficult to distinguish between care and activity-based decisions; even when courts concentrate on quality-of-care decisions they can convert an activity-based decision to a quality-of-care decision. "[W]hen there are substitutes for an activity, the decision to engage in that activity may be seen as an 'untaken precaution' if the substitute appears less risky." Gilles,

comparative—what could the defendant have done differently and what effect would that have had on the victim. The inquiry into activity-based decisions is the same—what could the defendant have done differently and what impact would that have had on the victim.⁹⁹ The only difference is that one is focused on the choices the defendant made in the care she used and the other on her choices about the frequency, method, timing, or place of the activity.¹⁰⁰ The inquiries are conceptually the same.¹⁰¹

Moreover, the appropriate level of due care often depends on the appropriate activity-based decision—as when a driver has been on the road a long time. In those cases, courts routinely evaluate the defendant's activity-based choice when determining whether the defendant exercised due care—although they rarely recognize that this is what they are doing.¹⁰² Not only does the literature recognize that location,¹⁰³ timing,¹⁰⁴ and method decisions

supra note 15, at 331; *see also* Grady, *supra* note 97.

99. *See* Donohue, *supra* note 26, at 1059 (suggesting that a court can determine whether defendant should have used a wrecking ball rather than dynamite more easily than it can determine whether defendant dynamited with due care).

100. For those who follow the analytical apparatus set up by Professor Hylton, which focuses on activity levels by translating activities into external costs and benefits, *see supra* note 17, the reasonableness inquiry asks whether the external costs of an activity-based decision greatly exceed the benefits of that decision. This too is a comparative analysis, for the analyst is comparing the external costs and benefits of two states of the world—either greater or lesser frequency, one location or another, one method versus another, or one time of day versus another. External harm is simply a synonym for the additional harm to the victim from one course of action over another, and that can easily be compared with the benefits of one course of action over another.

101. The Restatement (Second) of Torts recognizes as much: “A negligent act may be one which involves an unreasonable risk of harm to another (a) although it is done with all possible care, competence, preparation, and warning, or (b) [if due care is lacking].” RESTATEMENT (SECOND) OF TORTS § 297 (1965). Subsection (a) must be referring to activity-based negligence when due care is taken because due care negligence is covered in subsection (b).

102. *See* Donohue, *supra* note 26, at 1060-62 (explaining that a truck driver will find the burden of staying awake more difficult the more she drives).

103. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20(k) *illus.*, at 294-95 (Proposed Final Draft No. 1, 2005) provides an example. Moreover, the Restatement itself recognizes the relevance of activity-based decisions:

The location at which an activity is conducted does not independently

can be analyzed under the reasonableness standard, courts have been doing this under the due care standard without acknowledging it.¹⁰⁵

Take the famous *Escola v. Coca Cola Bottling Co.*¹⁰⁶ Plaintiff sued when a soda bottle exploded in her hand from a hairline fracture in the bottle.¹⁰⁷ The court held that because soda bottles should not be reused without a "commercially practicable" test that eliminated the possibility of such hairline fractures, the jury could infer

determine whether the activity is abnormally dangerous. However, the location frequently has an important bearing on the two criteria [that determine whether an activity is abnormally dangerous]. For example, the activity's location may substantially affect the magnitude of the risk the activity entails; as noted in comment g, blasting in a developed area of the city creates a highly significant risk in a way that blasting on a deserted mountainside does not. As far as common usage is concerned, location can likewise be relevant: in arid communities, it may be a common practice for farmers to collect water for irrigation facilities, while this would not be common in communities where the rainfall is plentiful.

Id. at 293-94.

Moreover, the reporters note in the Restatement that "it is far from clear that Judge Posner is correct in assuming that courts lack the ability to rule on the reasonableness or negligence of keeping a tiger in one's back yard," noting also that "[t]he availability of the rule of strict liability has rendered it unnecessary for plaintiffs to endeavor to bring negligence claims." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM 364 (Proposed Final Draft No. 1, 2005).

104. In nuisance cases, for example, "when the place, kind, or amount of activity is an important factor in bringing about the right level of damage, it should be part of the legal standard." LANDES & POSNER, *supra* note 5, at 70. According to Professor Gilles: "Certainly this is true in nuisance law, where courts frequently consider whether a defendant should be ordered to reduce the scale or frequency of his or her activities to abate the nuisance." Gilles, *supra* note 15, at 334.

105. In addition to the examples in this Article, consider *Adams v. Bullock*, 125 N.E. 93, 93 (N.Y. 1919) ("The defendant in using an overhead trolley was in the lawful exercise of its franchise. Negligence, therefore, cannot be imputed to it because it used that system and not another.") (citing *Dumphy v. Montreal Light, Heat & Power Co.*, [1907] A.C. 454 (P.C.) (U.K.)); and *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939) (choosing to disobey statutory command to walk in direction of oncoming traffic is excused because volume of traffic made that side of the road an unreasonable location for walking).

106. 150 P.2d 436 (Cal. 1944).

107. *Id.* at 437.

negligence from the explosion.¹⁰⁸ Although this appears to some to be a misapplication of negligence principles,¹⁰⁹ it is not. The defendant had to decide between two methods of delivery—new bottles, where the incidence of defects was far lower, or used bottles. The court concluded that if used bottles could not be made without the fracture the defendant would have to use new bottles.¹¹⁰ This responds to the common sense notion that the choice between two methods of delivering the beverage—in either new or used bottles—must take into account the relative incidence of risks of each method. In the context of that case, if used bottles could not be made safe they were an unreasonable—or abnormally dangerous—choice.

Similarly, we can understand the mysteries of the famous *Bolton v. Stone*¹¹¹ in activity-based terms. The plaintiff was injured when a cricket ball hit her outside the playing field.¹¹² She lost the case because the risks were so small as to be reasonably disregarded, but the judges went on to speak of the cricket club's general responsibility.¹¹³ After indicating that the substantiality of the harm mattered, Justice Reid said: "I do not think that it would be right to take into account the difficulty of remedial measures,"¹¹⁴ suggesting a kind of disproportional Hand formula—if the risks are substantial enough the burden of precautions is not relevant unless the precautions are disproportionately high. He then continued, "If cricket

108. *Id.* at 439-40.

109. See GEISTFELD, PRODUCTS LIABILITY, *supra* note 10, at 23. Professor Geistfeld correctly notes that "reasonable care does not ordinarily involve the total elimination of risk," and then says that the court made the mistake of not balancing the relevant risks and precautions when considering the use of used bottles. *Id.* As explained in this Article, however, the reasonableness of using the used bottles cannot be decided separately from considering the substitutability of new bottles for used bottles. Once we recognize that the defendant was not only making a decision about the risks from used bottles but also a decision about the comparative risk of new and used bottles, we can understand that the court was making a determination about the reasonableness of that method-of-activity decision.

110. *Escola*, 150 P.2d at 439.

111. [1951] A.C. 850 (H.L.) (U.K.).

112. *Id.* at 851.

113. See *id.* at 854.

114. *Id.* at 867.

cannot be played on a ground without creating a substantial risk, then it should not be played there at all."¹¹⁵ This has been taken to be a test for negligence that looks only at the degree of risk, and not at the reasonableness of that risk—much like the test for abnormally dangerous activities.¹¹⁶ But it probably has a different meaning. It looks, in fact, to be a statement that the cricket game might have been in an unreasonable location. As Judge Reid said, if the risks are substantial enough—even after due care is taken—perhaps the game should not be played “there.”¹¹⁷ There is probably a more reasonable location for the game—one where the lower value of the location might be offset by the greater safety of the location. This is an activity-based decision.

Finally, as soon as courts are free to do directly what they are now doing under the guise of determining whether to apply strict liability, courts will do a better job of making the relevant reasonableness assessment—which is the goal of my proposal to integrate strict liability analysis into negligence analysis.¹¹⁸ Once courts ask directly whether the defendant has chosen a reasonable location for her activities, for example, courts will develop methodologies for evaluating that decision, will evaluate how defendant’s own studies, or lack thereof, are relevant to their determination, will rely on academic studies about sighting decisions, and

115. *Id.*

116. See WEINRIB, *supra* note 6, at 148-50.

117. *Bolton*, [1951] A.C. at 867.

118. This was the principal lesson of Judge Posner in *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990). He recognized that one cannot tell whether strict liability should be applied without knowing whether location decisions were reasonably made and that once one knows whether location decisions were reasonably made, one no longer needs strict liability. David Rosenberg has pointed out that Judge Posner needed to, and did, reverse the district court finding that the railroad yard in a city was an unreasonable location for transporting dangerous chemicals. Rosenberg, *supra* note 16, at 1210-14. But the district judge’s mistake was to think that he could determine the reasonableness of the location without looking at alternative locations for either residences or chemical shipping. Once we focus, as Posner did, on the alternative locations for these conflicting activities, the mistake is corrected, but we no longer need strict liability. The district judge’s mistake occurred because the “abnormally dangerous” test points to the nature of the chemical rather than to the issues of how and where it is shipped. Incorporating strict liability into negligence analysis will avoid this mistake. *Id.*

will begin assessing the relevance of trade custom—that is, where the activity is commonly done. Actors will soon learn to make better location decisions and lawyers will be able to give their clients better advice.

2. *The Negligence Standard is a Flexible Tool for Determining Responsibility.* Even beyond the clear ability of the negligence standard to lead to structured determinations about the reasonableness of relevant activity-based decisions, the negligence standard is flexible enough to avoid being under-inclusive. This flexibility helps overcome two disadvantages that the negligence standard is thought to have—namely, that it is expensive to administer (because it requires the plaintiff to prove fault) and that it might lead to false negatives—outcomes where the defendant should be responsible but the plaintiff is unable to prove it. First, the reasonableness standard is flexible enough to recognize the many circumstances in which a reasonable actor would, in light of the risks of her activity, gather more information; it contains a robust duty to investigate. Second, the reasonableness standard allows the court to reduce administrative costs when the fault can be inferred from the way the harm occurred.

a. *Negligence and the Duty to Investigate.* Accidents often happen because of uncertainty, and one function of tort law is to pressure actors to reduce accident costs by acquiring the information they need to avoid or reduce harms. In this connection, it has been thought that one advantage of strict liability has been to induce an actor to avoid liability by investing in information to reduce accidents.

Thus, it has been said that:

[Although the negligence standard creates incentives to search for methods that would avoid a negligence claim] strict liability creates additional research incentives, because under strict liability there is more to be gained by avoiding liability. Under negligence, injurers are not liable for accidents that are not worth avoiding. Consequently, injurers have no incentive to attempt to discover cost-effective methods of avoiding these injuries. In contrast, under strict liability . . . [B]ecause injurers are liable for those injuries anyway, discovering a cost-effective method of reducing or eliminating the injuries they cause will redound to their benefit . . . In a sense, some of the research incentives that strict liability may create are incentives to discover activities or

activity-based decisions that may substitute for those that currently generate strict liability, in order to reduce net costs.¹¹⁹

This view assumes, with unnecessary rigidity, that the negligence standard does not interdict harms that could have been prevented with the investment of additional funds in safety. To the contrary, the negligence standard has proven to be flexible enough to impose responsibility when the relevant actor has failed to get and rely on information that is reasonably available and that would have enabled the actor to reduce the harm.¹²⁰

The essence of the reasonableness standard is that an actor must look out for the welfare of others when the actor has created a risk or stands in such a relation to the victim that a reasonable person in that position would take pains to consider how the victim might get hurt.¹²¹ Under this general concept, the reasonableness standard has long put pressure on the defendant to reasonably investigate its own product in order to reduce risks. Indeed, the granddaddy of all products liability, *MacPherson v. Buick*,¹²² involved the duty to investigate, for the alleged negligence was that the defendant failed reasonably to investigate parts that it bought.¹²³ Juries have long been allowed to determine that the failure to investigate is unreasonable¹²⁴ and the

119. ABRAHAM, *supra* note 23, at 164-65; see also James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 928-29 (1981); David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 711-13 (1980); Steven Shavell, *Liability and the Incentive to Obtain Information about Risk*, 21 J. LEGAL STUD. 259, 260-61 (1992).

120. Steven Shavell has shown how a socially beneficial level of investment in information can be induced by either the regime of strict liability or the appropriate negligence regime. Shavell, *supra* note 119. In this Article, I show that the negligence regime is the appropriate one; an actor is unreasonable if the actor fails to invest in information whenever the benefits of the information outweigh the burden of getting the information.

121. See, e.g., Porat, *supra* note 77, at 106 (showing how the Hand formula reflects the Kantian notion that it is immoral to prefer one's own interest in saving money to the interests of others in avoiding harm).

122. 111 N.E. 1050 (N.Y. 1916).

123. The plaintiff alleged that the wheel's "defects could have been discovered by reasonable inspection, and that inspection was omitted," but not that the defendant knew of the defect or willfully concealed it. *Id.* at 1051.

124. See, e.g., *McDougald v. Perry*, 716 So. 2d 783, 786-87 (Fla. 1998) (stating that although defendant did not manufacture the chain that might

products liability “revolution” has continued to develop that notion.¹²⁵

With hindsight, we can see that the negligence standard has ably performed the function that Guido Calabresi and Jon Hirschoff would have assigned to strict liability thirty-five years ago—namely, to identify the actor who can acquire and disseminate information that can be used to reduce the costs of accidents. They argued that:

[When a] producer is in a position to compare the existing accident costs with the costs of avoiding this type of accident by developing either a new product or a test which would serve to identify [those who are at risk from a product] . . . the producer is the cheapest cost avoider, the party best suited to make the cost-benefit analysis and to act on it.¹²⁶

That is true, but irrelevant to the function of strict liability. Identifying the least cost avoider does not make the liability strict; it simply makes the failure to incur the cost unreasonable.

b. *Activity-Based Decisions and Res Ipsa Loquitor.* Moreover, the reasonableness standard is also flexible enough to reduce the administrative costs of determining fault when those costs are unnecessary. In particular, when the harm is of a type that would not have occurred had decisions been reasonably made, the doctrine of *res ipsa loquitor* allows the plaintiff to shift to the defendant the burden of coming forward with the evidence or the burden

have been defective, the jury may find defendant liable for accident harm because it had control of the chain and inspected it); *Bethel v. N.Y. City Transit Auth.*, 703 N.E.2d 1214, 1216 (N.Y. 1998) (stating that although common carrier is no longer held to utmost standard of care, jury may find defendant bus company liable for failing to observe a defective seat during routine maintenance).

125. See, e.g., *Richter v. Limex Int'l, Inc.*, 45 F.3d 1464, 1471 (10th Cir. 1995) (defendant seller of trampoline as an exercise device had a duty to warn consumers that the use of the trampoline for jogging might cause stress fractures); *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038 (Kan. 1984) (explaining that the defendant had a duty to warn consumers based on research and scientific developments and publications in the field); see also 1 ROBERT D. HURSH & HENRY J. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 2:29, at 212 (2d ed. 1974) (duty to make tests and inspections as would be reasonably necessary to make a safe product).

126. Calabresi & Hirschoff, *supra* note 18, at 1062.

of proof.¹²⁷ This doctrine is applicable to both due care and activity-based decisions. When the blast that is used to fell a sixty-foot tree sends a portion of the tree 450 feet, it is not hard to conclude that a reasonable person would have used an ax, a saw, or less dynamite.¹²⁸

Even beyond formal application of *res ipsa loquitur*, courts in negligence cases frequently rely on presumptions and reduced evidentiary burdens to make sure that plaintiffs are not denied an opportunity to prove fault because of the circumstances in which the fault occurred. And the negligence standard contains a built-in concept of quasi-strict liability. When an actor acts on the basis of specialized knowledge of the kind that makes it difficult for courts to second guess their decisions, the law absorbs a private standard as the standard of negligence and holds the defendant to that standard. This gives negligence liability the feel of strict liability without removing the anchor of fault from the finding of responsibility. In professional malpractice settings, this allows the court to defer to the standard of care set by the profession while making it a fault not to meet that standard.¹²⁹ In products

127. See, e.g., *State Farm Fire & Cas. Co. v. Municipality of Anchorage*, 788 P.2d 726, 729-31 (Alaska 1990) (discussing a break in the city's water main and stating that strict liability does not apply because most expected harm can be removed by reasonable care); *Dye v. Burdick*, 553 S.W.2d 833 (Ark. 1977) (applying *res ipsa loquitur* to a case involving a bursting dam); *Hartford Fire Ins. Co. v. Pub. Serv. Co. of Colo.*, 676 P.2d 25 (Colo. Ct. App. 1983) (involving transportation of natural gas and subsequent explosion); *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856 (Minn. 1984) (involving an explosion in the course of transmitting natural gas); *Fleege v. Cimpl*, 305 N.W.2d 409 (S.D. 1981) (involving electric water pump in river); *Crosby v. Cox Aircraft Co.*, 746 P.2d 1198 (Wash. 1987) (involving an airplane crash); *Foster v. City of Keyser*, 501 S.E.2d 165 (W. Va. 1997) (involving the transmission of natural gas).

128. See *Sullivan v. Dunham*, 55 N.E. 923, 926-27 (N.Y. 1900) (imposing strict liability, but referring to the "special method" the defendant used to take down the tree); see also *Berg v. Reaction Motors Div.*, 181 A.2d 487 (N.J. 1962) (explaining that a rocket engine testing facility a thousand feet from the center of a small village is subject to strict liability for compensatory but not punitive damages). The *Berg* case could have been decided almost as quickly under a negligence standard. It is hard to imagine that the location was so superior to other locations that it was reasonable to put the testing facility so close to the village. Indeed, the court said that the defendant could have shown "greater care and diligence, perhaps in the selection and arrangement of the testing sites and stands," implying that the court found the location to be unreasonable before it applied strict liability. *Id.* at 496.

129. See *Mitchell v. United States*, 141 F.3d 8, 13 (1st Cir. 1998); Complete

liability settings, it allows the court to defer to the producer's manufacturing standard, while making it a fault—or defect—not to meet that standard.¹³⁰ The negligence standard is fault-based but not toothless.

The law ought to advance with a scalpel, not a blunderbuss. The doctrine of strict liability represents the law's blunderbuss, scattering shot around in the hope that the law can address activity-level decisions that are not captured by the reasonableness standard. But the weapon of strict liability is an unnecessary and overly broad weapon. It is overly broad because it provides no sure way of knowing when the blunderbuss should be pulled out and because it punishes those who are not at fault. It chills decisionmaking that is at the heart of what it means to be a responsible person and is especially problematic when we do not want the law to intervene to determine whether a person undertakes an activity too frequently. Strict liability is unnecessary because the negligence standard is fully able to assess which activity-based decisions are relevant to the determination of fault and that those decisions have been unreasonably made. Judicial intervention to address accidents ought to be the sole province of the reasonableness standard.

In light of this conclusion, how are we to understand the doctrine of strict liability?

E. *The Outcomes in Strict Liability Cases Can Best Be Understood as Applications of the Fault-Based Theory That I Outline*

Increasingly, the doctrine of strict liability is sustained simply because people believe it is there. Theorists, seeking acceptability, want their theories to describe the world as they think it to be; they go to ingenious lengths to prove that their theories support strict liability doctrine as we believe it to be. Analysts, relying on the language of the opinions, repeat what courts think they are doing rather than determine what courts are actually doing. And courts

Family Care v. Sprinkle, 638 So. 2d 774, 777 (Ala. 1994). See generally 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 189 (2002).

130. RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2(c), at 18 (1998) (defining manufacturing defects).

sustain the myth of strict liability simply by doing the relevant reasonableness analysis and then applying the term "strict liability" to their conclusion. It looks as if strict liability is real when it is, in fact, only a constructed reality.

In this section, I undermine the myth of strict liability with two kinds of claims. The first is that judges deciding the venerable strict liability cases—*Rylands v. Fletcher* and the early blasting cases—could easily have reached the same outcome under an activity-level negligence analysis. This is covered in subsection one. My second claim is that strict liability has eroded as a doctrinal category to the point where it is empty. Support for strict liability is doctrinally weak. Any expansion of strict liability beyond its origins has hardly been uniform and the retreat from strict liability has been palpable. In particular, it is apparent that at least some courts use the term "strict liability" simply as a label they apply to the conclusion that the defendant made unreasonable activity-based decisions. As the appropriate analytical apparatus has been revealed in the last three decades, judges have been using it in the analysis and disposition of "strict liability" claims, applying or withholding "strict liability" as a conclusion, not a doctrinal category. I expand on this point in subsection two.

1. *Fletcher and the Blasting Cases*. My general claim is that courts developed strict liability because they did not have the analytical tools to understand the intuition that led to their decisions. In this section, I support that claim by showing how the venerable strict liability cases involved relevant activity-based decisions that could easily have been found to be unreasonable.

The fountainhead case is *Rylands v. Fletcher*.¹³¹ Given the uneven way that the case has been applied,¹³² the case's value as precedent is suspect, notwithstanding the case's

131. (1868) 3 L.R.E. & I. App. 330 (H.L.).

132. See *Chi. & N. W. Ry. v. Tyler*, 482 F.2d 1007 (8th Cir. 1973) (rejecting application of strict liability); *Dye*, 533 S.W.2d at 883 (rejecting application of strict liability); *Brown v. Collins*, 53 N.H. 442 (1873) (rejecting the application of *Rylands* to a runaway horse that caused property damage); *Losee v. Buchanan*, 51 N.Y. 476 (1873) (refusing to apply *Rylands* to an exploding boiler that caused harm to neighbor); *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221 (Tex. 1936) (refusing to apply *Rylands* principle to salt water escaping from defendant's ponds onto plaintiff's land).

near mythic status.¹³³ Yet, *Rylands* is a decision about unreasonable locations. The defendant constructed a reservoir for use by a cotton mill in a district that had previously been devoted to coal mining.¹³⁴ A latent defect under the reservoir caused the water to run into an abandoned mine shaft and then into plaintiff's mine.¹³⁵ The plaintiff mine owner could claim that the contractors hired by the reservoir owner had been negligent, but the plaintiff sued the reservoir owner directly, even though it could not show that the reservoir's owner had been negligent in choosing or supervising the contractor.¹³⁶ Although the defendant's liability might have been reached by extending doctrines of trespass¹³⁷ or nuisance,¹³⁸ the court instead recognized a no-fault cause of action when the use of land is "non-natural."¹³⁹

The conditions that give rise to non-natural use and liability were not explained. However, the fault-based intuition that underlies the court's decision is not hard to discern. The case involved a conflict between potentially incompatible uses of land—coal mining and cotton milling. The coal mines had been there first, making coal mining a background fact that the defendant should have reasonably accounted for in determining where to construct his cotton mill. Moreover, coal mines must, by physical necessity, be where the coal is, while cotton milling can be done in innumerable locations. Given our current understanding of activity-based decisions, what the court called a "non-

133. The reporter's notes to the Restatement (Third) of Torts: Liability for Physical Harm contain references to some of the articles and many of the cases that make up the *Rylands* legacy. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20 cmt. d, at 297-99 (Proposed Final Draft No. 1, 2005).

134. *Rylands*, 3 L.R.E. & I. App. at 331.

135. *Id.* at 332.

136. *Id.* at 331-32.

137. No trespass occurred, technically, because the water had not gone directly from defendant's to plaintiff's land; instead, the water had gone through an intermediate property to get to plaintiff's land. *See id.* at 337. The result could have been reached by extending the doctrine of trespass from direct to indirect invasions of property.

138. Nuisance law did not provide a remedy because the harm was accidental rather than knowing, and because the interference with plaintiff's property was not continuing. *See id.* at 337-38.

139. *Id.* at 338-39.

natural" use was a use in which the decision about where to locate had to be reasonably made in light of uses of adjoining land so that interferences were minimized.¹⁴⁰ And it is not hard to see that the function of liability in this case is to force the defendant to internalize all of the costs of the location because that is the only way of ensuring a socially optimal location decision.¹⁴¹

In other words, the origin of "strict liability" in *Rylands* is fully consistent with the notion that liability serves to force reservoir owners to think more reasonably about their location decisions.¹⁴² Where the land is subject to preexisting uses, and the preexisting uses cannot be reasonably done in another location, it seems unreasonable—non-natural—to locate a reservoir there for cotton milling—a use that can be done in other locations—without being willing to insure against harm that occurs from unforeseen defects in the soil.

Similarly, the early blasting cases were written in the language of strict liability but could easily have had the same outcome under a reasonableness standard. In the Erie Canal cases,¹⁴³ blasting might be done with due care but with unreasonably large quantities of powder.¹⁴⁴ Using less

140. For similar reasons, we can relate the "non-natural use" rubric with the more modern notion of use that is "customary" in the area. In terms of my analysis, we can see that use of the land for storing water was not a custom in the area because the best (and therefore most reasonable) use of the land was for coal-mining.

141. This may be what Jules Coleman had in mind when he opined that fault in *Fletcher* might be "fault merely in virtue of engaging in an activity" rather than "fault in the way in which one engages in it." COLEMAN, *supra* note 6, at 368.

142. Indeed, the Restatement (Second) of Torts expressly noted that whether reservoirs are abnormally dangerous depends on their location. RESTATEMENT (SECOND) OF TORTS § 520 cmts. i-j (1965).

143. *St. Peter v. Denison*, 58 N.Y. 416 (1874); *Hay v. Cohoes Co.*, 2 N.Y. 159 (1849); *Tremain v. Cohoes Co.*, 2 N.Y. 163 (1849). Ironically, while courts were making these cases look like strict liability cases, they were simultaneously making it clear that in analogous situations they would test the method of undertaking an activity under a reasonable standard. See, e.g., *Panton v. Holland*, 17 Johns. 92 (N.Y. Sup. Ct. 1819) (stating that a plaintiff who challenges damage from the foundation dug by an adjoining neighbor must prove "that the act [adopted by the defendant] was unlawful").

144. In addition, in the *St. Peter* case, 58 N.Y. at 416, the blasting was done to remove frozen earth, suggesting that perhaps waiting until the next thaw

powder per blast would have taken longer, but would also have reduced the risk of harm. Had the court understood this, its analysis might have been more penetrating; it would not violate anyone's sense of justice if the court had said that proof that the harm occurred is proof that the defendant used an unreasonable amount of blasting powder. Instead, the courts relied upon vague notions of public policy to deal with conflicting rights, a sure sign that their policy decision relied upon truncated analysis. Even so, the opinions suggest that the courts were conscious of the fact that the defendants had made unreasonable decisions.¹⁴⁵

Other early cases are equally suggestive. In *Sullivan v. Dunham* the defendant was blasting to remove a sixty-foot tree and the blast hurled a piece of wood more than 400 feet, killing the victim.¹⁴⁶ Clearly, there would have been more reasonable means of getting rid of a sixty-foot tree. In another early case, *Guille v. Swan*,¹⁴⁷ a hot-air balloonist landed in New York City without intending to, and the crush of people who came to see the balloon damaged the plaintiff's property. As Judge Posner analyzed this case in *Indiana Inner Harbor Belt Railway Co. v. American Cyanamid Co.*,¹⁴⁸ given the little technology for controlling hot air balloons and the little value of the defendant's activity in New York City—the ballooning could have been done anywhere—the decision to do the ballooning in the city subjected the defendant to liability. It was an unreasonable location for ballooning.

In short, the opinions in the early “strict liability” cases could easily have been written to show that the defendant's activity-based decision was unreasonable. The historical

might have been a reasonable alternative. In any event, the court noted that the defendant could have avoided the damage by giving reasonable warning, further accenting the case's reasonableness foundation. *Id.* at 423-24.

145. See, e.g., *Hay*, 2 N.Y. at 161 (“If [the defendant] cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom.”). The terms “such means” could refer either to the amount of blasting powder the defendant used or to the fact that the defendant had other means of removing the rock. *Id.*

146. *Sullivan v. Dunham*, 161 N.Y. 290, 290 (1900).

147. 19 Johns. 381 (N.Y. Sup. Ct. 1822).

148. 916 F.2d 1174, 1176-77 (7th Cir. 1990).

support for true "no-fault" liability disappears.¹⁴⁹

2. *The Modern Shift from Strict Liability to Unreasonable Activity Liability.* Outside of the venerable cases, support for strict liability as a doctrine is weak indeed. Strict liability is eroding even in the blasting cases.¹⁵⁰ There is no uniformity of approach among the

149. Analysis also undercuts the notion that strict liability applies in the animal cases. The Restatement (Third) of Torts: Liability for Physical Harm suggests that "[a]n owner or possessor of livestock or other animals . . . that intrude upon the land of another is subject to strict liability." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 21, at 328 (Proposed Final Draft No. 1, 2005). This appears to be a highly truncated view of strict liability. Aside from the fact that "strict liability" is limited by defenses of consent and obligation, *id.* § 25, contributory negligence, *id.* § 25, and proximate cause, *id.* § 29, the underlying issue in these cases is the duty to maintain fences, which sometimes falls on the livestock owner and sometimes on the victim landowner. See *id.* § 21 cmt c, at 330-33. That determination is one of duty, not of strict liability, and it depends on the comparative costs and benefits of the two options. The livestock cases, therefore, decide when it is unreasonable not to build a fence; liability follows from the finding that the party with the responsibility failed to fulfill it. This is not strict liability. Similarly, the invocation of strict liability for wild animals is really liability for animals that are dangerous when not reasonably controlled—"likely, unless restrained, to cause personal injury"—and, in any event, is highly dependent on the location of the animal. *Id.* § 22. The invocation of strict liability for animals known to have abnormally dangerous tendencies relies on the knowledge of dangerousness to prove fault and the owner's opportunity to get a less dangerous pet to provide reasonable alternative choices. *Id.* § 23. The opinions could easily be rewritten as activity-based negligence cases.

150. Blasting cases that purport to apply strict liability often appear to use a reasonableness analysis to determine whether to apply strict liability, rendering strict liability superfluous. See, e.g., *Harper v. Regency Dev. Co.*, 399 So. 2d 248, 252 (Ala. 1981) (adopting strict liability but determining it "relatively unimportant" whether or not they adopt strict liability; the "fault concept is preserved simply by transposing the basis for testing culpability from the degree of care exercised in the manner in which the blasting operation is conducted to the conduct of the blaster in carrying on an abnormally dangerous activity which subjects innocent parties to an unreasonable risk of harm"). Other cases do not hold an activity to be abnormally dangerous until it is found to be unreasonable. See, e.g., *Ballard v. Buckley Power Co.*, 60 F. Supp. 2d 1180, 1187-88 (D. Kan. 1999) (finding for defendant for lack of cause and thereafter stating that plaintiff failed to produce evidence that the blasting was abnormally dangerous "under the conditions present in this case," citing lack of evidence of "excessive charge inappropriate to the surroundings" or "an unusual charge"). Other cases deny strict liability in blasting cases in dicta. For example:

Even blasting, the activity most commonly recognized as ultrahazardous, may not give rise to strict liability if conducted in an

various courts; for any given activity, some courts write opinions using the language of strict liability and some do not.¹⁵¹ Some jurisdictions have rejected or seriously questioned the concept of “abnormally dangerous” activity.¹⁵² In other jurisdictions, blasting is “essentially the

appropriate locale far away from human habitation or anything of value. To impose an inflexible strict liability rule on all blasting cases without consideration of the circumstances would be just as incorrect as [to argue that transporting hazardous wastes can never be subject to strict liability].

Daigle v. Shell Oil Co., 972 F.2d 1527, 1544 (10th Cir. 1992) (citations omitted).

151. Notwithstanding the analysis in the text of this Article, several cases present isolated instances of strict liability in which neither the activity level nor the quality of care seems to be unreasonable. Under the theory of this Article, they are wrongly decided. Several cases involve a manufacturer's responsibility when the harm caused by the product could not have been reasonably known at the time the product was put on the market. *See, e.g.*, *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1147 (Mont. 1997) (stating that strict products liability makes the manufacturer responsible if, given the information that later developed, it would have been unreasonable to put the product on the market without taking that information into account); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 750-51 (Wis. 2001) (manufacturer of latex gloves is responsible for allergic reaction that even medical community could not trace to the gloves). These decisions, which seem to be a part of the process of working out the responsibility of manufacturers to investigate the potential hazards of their products—itself an activity-based decision—are out of step with the decisions of other courts, and are not endorsed by most commentators. *See, e.g.*, *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549 (Cal. 1991); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534 (Me. 1986); *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998) (abrogating earlier cases prospectively); *Feldman v. Lederle Labs*, 479 A.2d 374 (N.J. 1984) (overruling an earlier case); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c), § 2 cmt. m (1998) (“An overwhelming majority of jurisdictions supports the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known to a reasonable person.”). Similarly, such celebrated cases as *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976), seem not to fit the analysis in this Article. There a railroad was held to be strictly liable for an explosion of the dangerous cargo the railroad was carrying on behalf of the United States government. *Id.* at 1205, 1214. Yet that case was decided primarily on the basis of the loss spreading rationale, which provided a basis for the court to overcome the defendant's argument that because it was required, as a common carrier, to carry the explosives, it should not be strictly liable for the harm that resulted. *Id.* at 1214. The court assumed that the cargo was ultrahazardous, so the court did not directly face the question of why strict liability applied. And, of course, the *Chavez* result is not uniformly accepted; other courts have denied liability when a common carrier is compelled by law to accept the cargo. *See Actiesselskabet Ingrid v. Central R.R. Co. of N.J.*, 216 F. 72, 78 (2d Cir. 1914).

152. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20

only activity that has been given strict liability treatment, at least so far.”¹⁵³ Although many jurisdictions purport to extend strict liability beyond blasting, the approaches are not uniform—the courts take diverse approaches even for those activities in which the logic of the blasting cases would seem to have the most application.¹⁵⁴

Just as important, it is evident that courts purporting to apply strict liability often do so only after concluding that the defendant made an unreasonable activity-based decision. Both the facts and language of the cases suggest that they are really activity-based negligence cases. Courts find the activity to be unreasonable and then apply the “strict liability” label to their conclusion. This, of course, robs “strict liability” of any meaning or purpose.

For example, in *Koos v. Roth*, the court departed from the holding in other cases¹⁵⁵ and applied the rhetoric of strict liability to hold a defendant responsible when, because of a surprise whirlwind, his controlled crop burn got out of control and burned a neighbor’s property.¹⁵⁶ Yet hints of reasonableness analysis permeate the opinion. In particular, the court did *not* say that the activity of controlled burning subjects the defendant to liability. Instead, the court talked about the characteristics of *this* controlled burn, saying that “[i]t is a matter of scale as well as location”¹⁵⁷ (both activity-based factors). According to the court: “When fire reaches the magnitude of essentially the whole surface of a large area open to the winds, the possibility that it will spread beyond its intended bounds cannot be excluded with any practical degree of care.”¹⁵⁸

cmt. d, at 299 (Proposed Final Draft No. 1, 2005).

153. *Id.* at § 20 cmt. e, at 300.

154. The paradigm of the blasting cases is thought to reflect several characteristics: (1) the defendant’s awareness of the dangers of blasting; (2) the benefits the defendant derived from blasting; (3) the existence of residual risk even after care is taken; and (4) the absence of meaningful contribution to the harm by the victim. One commentator had expressed surprise about how little this paradigm has been applied. See Jones, *supra* note 10, at 1726-49.

155. See, e.g., *Boynton v. Fox Denver Theatres*, 214 P.2d 793 (Colo. 1950) (involving spread of trash fire); *Miller v. Sabinske*, 322 S.W.2d 941 (Mo. Ct. App. 1959) (involving spread of open field fire).

156. *Koos v. Roth*, 652 P.2d. 1255 (Or. 1985).

157. *Id.* at 1265.

158. *Id.* *Koos* provides the support for an illustration in the Restatement

Not only was the court influenced by the magnitude of this burn, which might easily be said to be unreasonably large—given the ability to confine the burn to smaller sections of land—but the court might also have been influenced by the existence of alternatives to the controlled burn as a way of clearing fields.¹⁵⁹

Similarly, in *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, chemicals used in a wood treatment plant leaked into the ground, damaging a neighbor's property.¹⁶⁰ In departing from decisions in other states and imposing strict liability,¹⁶¹ the court emphasized the plaintiff's allegations of a "high degree of significant risk of harm posed by Defendant's hazardous waste activities, certainly not a matter of common usage, conducted in close proximity to residential areas and municipal ground wells."¹⁶² If we can assume that wood treatment facilities

(Third) of Torts: Liability for Physical Harm that itself reflects the activity-based characteristics of the controlled burn cases. The illustration itself mentions the "size of such fires" as contributing to the substantial harm to the neighbor. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20 cmt. h, at 290 (Proposed Final Draft No. 1, 2005).

159. See generally Kathryn V. Fields, Note, *Field Burning: New Tinder for the Flame of Strict Liability*, 19 WILLAMETTE L. REV. 767 (1983). The court in *Koos* emphasized the element of choice by noting that defendant could "choose whether or not to chance the potentially costly consequences." *Koos*, 652 P.2d at 1262.

160. *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 842 F. Supp. 475, 476 (D.N.M. 1993).

161. See, e.g., *Sealy Conn., Inc. v. Litton Indus.*, 989 F. Supp. 120 (D. Conn. 1997) (stating that, when handling of hazardous wastes is only incidental to manufacturing activities, the manufacturer is not subject to strict liability). Courts do not generally apply strict liability when companies generate wastes as a byproduct of the manufacturing process, but sometimes do apply strict liability to companies that handle other people's waste. This shows that something other than the mere dangerousness of the activity is going on; it is hard to see how toxic wastes are less dangerous in the hands of those who create them than in the hands of those who dispose of them. If "abnormally dangerous" was something about the dangerousness of the chemical, the same rule should be applied to both types of waste. The distinction is relevant to a reasonableness analysis, however, because the reasonableness of the location of the waste may be different if waste is a byproduct than if waste is the product itself. The reasonable location for the plant that generates the waste will be influenced by considerations related to the location of the primary product, not just the dangerousness of the waste, while the location of the waste as a product is likely to involve only a consideration of the best location for the waste.

162. *Schwartzman*, 842 F. Supp. at 478-79.

can be located anywhere, then locating them "in close proximity to residential areas" was unreasonable.

Another case that invokes strict liability where reasonableness analysis could have achieved the same outcome is *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*¹⁶³ One defendant tried to dispose of hazardous waste by incineration but its incinerator was not up to the task.¹⁶⁴ It then hired another (inexperienced) defendant to get rid of the waste, and the second defendant did this by putting the highly corrosive chemicals into metal pipelines.¹⁶⁵ The evidence showed that other companies generally dispose of this kind of waste by deep-sea disposal, deep-well injection, and on-site incineration.¹⁶⁶ Given the risky option chosen by the defendant in the face of good options, the court could easily have said that both defendants made unreasonable choices about which method to use.¹⁶⁷

Finally, in *Luthringer v. Moore*, the defendant exterminator used a gas to get rid of roaches in the basement of a building with many commercial tenants.¹⁶⁸ The court's opinion focused on the circumstances that led to the release of the gas, including the fact that liquid pesticide was a less useful but safer alternative to the gas—whose advantage was that it penetrated through walls. Under these circumstances, it is not difficult to believe that the use of gas instead of the liquid was unreasonable.

In sum, the doctrine of strict liability arose in cases in which the defendant made unreasonable activity-based decisions. That doctrine served a useful function when courts could not identify how to evaluate the reasonableness of activity-based decisions, but it has now outlived its usefulness. Tort doctrine would be more meaningful and analysis more direct if the label were dropped completely and courts relied explicitly on reasonableness analysis.

163. 678 F.2d 1293 (5th Cir. 1982).

164. *Id.* at 1298.

165. *Id.* at 1299.

166. *Id.* at 1297.

167. *See id.* at 1307-09.

168. *Luthringer v. Moore*, 190 P.2d 1, 3 (Cal. 1948).

II. IMPLICATIONS FOR LEGAL REASONING

The doctrine of strict liability exists because we believe that it exists. And we believe that it exists because courts lacked an analytical basis for understanding that even when an injurer exercises due care the injurer may make unreasonable choices about where, when, how, and how often to undertake an activity. Strict liability is a doctrine that was invented out of necessity to make up for the analytical deficiencies of our earlier view of how to think about accidental injury. To be sure, no-fault liability is theoretically possible and some cases have held the defendant responsible even though the defendant has exercised due care, but those cases could have been decided the same way using an activity-based reasonableness test. Courts and commentators made up the notion of “abnormally dangerous activity” without realizing that the term actually means activity that is done with reasonable care but in an unreasonable place or time or with an unreasonable method or frequency.

The doctrine of strict liability for abnormally dangerous activity then took on a life of its own. Courts and commentators began to bend theory to fit the doctrine *as we believed it to be* rather than to recognize that the “strict liability” cases were really fault-based cases of a different kind. Soon it was commonly believed that the negligence standard was incapable of detecting unreasonable activity-based decisions, that an injurer’s frequency of activity was always subject to oversight, and—much the same thing—that all external costs of an activity ought to be internalized. These were, to my mind, analytical mistakes made to support a non-existent doctrine.

We are left to speculate about what this analysis means for our concept of legal reasoning and the craft of judging. What are we to learn about legal reasoning from this example of doctrine—the doctrine of “abnormally dangerous activity”—that is misleading and analytically empty? When the outcome of cases appears to be correct, but the explanation for the outcome is analytically empty, what does this say about the craft of legal reasoning?

In fact, it appears that legal reasoning too quickly grasps at superficial and analytically empty concepts in order to mask the fact that judges often decide cases

without a full analytical justification for the outcome. In its ideal state, the concept of legal reasoning assumes that the outcome of a case is derived from a process of thought that can be articulated and specified. That is, the concept of legal reasoning assumes that judges have a process for thinking about the problem presented in a way that directs them from an understanding of the values that they must consider to the outcome they reach. It assumes that the outcome is determined by the reasoning they use and that judges can explain their reasons in their opinions, that their thinking is transparent. But that has not been the case in the "abnormally dangerous" context. The reasons have been superficial and vacuous, mere labels for outcomes rather than guides to analysis.

Instead of legal reasoning of the type just described, in the case of "abnormally dangerous activities," judges appear to have decided cases on the basis of intuitions about justice—that is on the intuition that some actors who have taken due care should nonetheless be responsible for the harm they have caused. To be sure, these intuitions are informed by prior cases and unarticulated notions of fairness and equality, but they have hardly been the kind of articulated justification for replacing the negligence standard that reveals the basis on which the decision was reached.¹⁶⁹ The fact that judges supply reasons for their decision does not necessarily mean that reasoning directed them to the outcome they reached. Depending on the nature of the reasons they give, judges could easily give reasons for an intuitional decision that occur to them only *after* the outcome has been determined.

In this respect, the concept of legal reasoning exploits

169. The difference between determinate reasoning and intuition is a matter of degree, of course. At one extreme we could imagine that a judge flips a coin to get a result, thus violating the assumption that the judge reasoned to the result, although there may be reasons to flip a coin as a mode of decision. At the other extreme, we could imagine a judge who starts with the problem before him and adopts a well-structured line of analysis that would identify the values that are at stake in the dispute, and the precise way those values should be considered in the context of the case in order to reach a result. The crucial issue is whether the way judges decide cases guides them from the problem to the outcome or whether they feel their way to the outcome without carefully crafted modes of analytical reasoning. But a theory of legal reasoning that does not demand as much analytical specificity as the problem warrants is settling for explanations rather than justifications.

an ambiguity in words like “reasoning” or “explanation” or “justification.” Judges supply reasons, of course. But they could supply reasons in the sense of “here is the best explanation I can give for what I decided” rather than reasons in the sense of “here is the thought process I used to come to the decision that I reached.” Explanations will not be justificatory if the explanation does not include a meaningful statement of the normative basis for preferring one outcome over another that allows the analyst to determine both what values are being advanced by those decisions and how those values will be evaluated in related cases. Legal reasoning has always required explanations but has not always required justifications. And legal reasoning has therefore been satisfied with superficial explanations for outcomes that are intuitionally correct but analytically vacuous. By definition, a statement of reasons that seeks to justify a decision reached on intuition cannot explain the thought process that led to the decision, for there was no such thought process. It can therefore meet neither the test of determinacy—since it does not reveal an analytical thought process—nor the test of transparency—for the statement of reasons does not reveal that the decision was reached before the reasoning was done.

The notion that cases are decided by something called legal reasoning is supported by the associated assumption that the language used to explain the law has meaning, or at least a meaning that is useful in understanding how the law gets from a statement of the problem presented by a case to a statement of the outcome of the case. But this association between conceptual language and legal reasoning assumes that the language judges use to express their reasoning has some meaning that can be ascertained and that this meaning guides the development of the decisionmaker’s thinking from problem to outcome.

Consider the following two statements:

- “To inflict this injury on the plaintiff without compensation would be unfair.”
- “To inflict this injury on the plaintiff without compensation would be blyczh.”

The first statement seems to be a statement of reasons, the second does not. But that is only because a word such as “fair” purports to have some content, while the made-up word “blyczh” obviously does not have content. If the word

"fair" has no known or decipherable meaning—or worse, if it has multiple meanings—then the two statements are functionally equivalent, and neither provides a reason for the decision—in terms of describing the thought process that is used to reach the decision. And that is true even if the word "fair" expresses only an intuition that was used to decide the case. An unexplained or unexplored intuition is not a basis for legal reasoning unless the intuition is identified as such—to meet the transparency requirement—and is accompanied by an initial justification for believing that the intuition comports with some relevant justification for the legal intervention—to meet the determinative and normative requirements. By definition, unadorned intuition is never an apt description of a thought process used in reaching a decision.

The link between the content of words and decisional intuitions is clear. After *Rylands v. Fletcher*, a landowner is sometimes responsible for damage done to a neighbor's property and sometimes not. When the court in *Rylands* said that the landowner is legally responsible if the owner's use of the land is "non-natural" the court gave a reason without analytical content. The concept of non-natural does not begin to point to the factors that are relevant to determining responsibility; it is a mere label attached to an intuition that needs to be explained—a categorical conclusion if you will. And the reference to "natural" could be taken in either a deontological sense—as in natural law—or in an economic sense—as in the most efficient use. This usage supplies an explanation without a justification. If the basis of a decision is intuition, not reason, then it would be natural to use words—like "fairness" or "non-natural"—that appear to have content but do not.

The fault is not with the judges, who do the best they can with the analytical apparatus that is available to them. The fault instead is with the theory of legal reasoning, which overemphasizes the amount of reasoning that goes into decisions and pretends that by using words to explain their decisions, judges have justified their decisions.¹⁷⁰

170. A tension undoubtedly exists between the desire to support the legitimacy of the law by emphasizing that it is based on legal reasoning and the frank admission that many judicial decisions have a high degree of intuitional, non-analytic content. In the desire to make legal reasoning look to be a self-contained and coherent system, legal reasoning has tolerated the use of words

Legal reasoning cannot achieve its ideal, which is to reveal the analytical justification for the outcome of a case, if it continues to satisfy itself with non-justificatory explanation and with words that have little justificational content. The death of strict liability is not only a corrective to unworkable doctrine; it is also a reminder that legal reasoning—that is, the reasons that the law provides for one outcome over another—may not advance justificational analysis. What matters is not necessarily what the court said it was doing but what the court did—the outcome, not the description of the outcome. The words used in opinions should be taken as placeholders for deeper justificational analysis until the analytical meaning of the words is fully understood.

CONCLUSION

Strict liability is dying because the analytics of accident law have shown that strict liability is the wrong container for understanding what courts are, and should be, doing when they assess responsibility for harm. Fault-based liability is the only justifiable basis for assigning responsibility and courts can use the fault concept to vindicate fully the important values that strict liability would legitimately vindicate.

In fact, outside of theories of distributive justice, we have *no* theory of strict liability. No theory of personal responsibility explains why a person who is not at fault in some relevant sense should be responsible for another's misfortune. No such theory explains why a person should be responsible for residual harm—that is, for harm that cannot be addressed through human ingenuity—just as no theory explains why one person should be responsible when lightning strikes another. To the contrary, not only would holding a person responsible under these circumstances deny the human agency involved in acting and deciding—by making acting and deciding irrelevant to responsibility—but it would also reduce an actor's freedom of activity. This normative point—which is the basis for withholding liability from a person who has taken reasonable precautions—provides a moral and consequentialist basis for withholding liability from a person who has also taken

reasonable precautions in deciding where, when, how, and how frequently to undertake an activity.

Theories that purport to support strict liability are in fact only theories about the supposed deficiencies of the fault regime—supposed problems of proof, cost, or mistake. The “theory” of strict liability is not about human responsibility but about institutional deficiency. Such theories misunderstand the genius and flexibility of the fault-based system. Fault is a measure of, and a limitation on, responsibility because it is a measure of human potential—both fulsome and limited. Fault reflects those aspects of human achievement that allow us to control our environment while simultaneously recognizing our limited ability to control our environment. We are not prescient, omniscient, or completely altruistic, even though we are smart, thoughtful, and understand the importance of sacrifices for the community. The fault system is not static or one-dimensional. It assigns responsibility based on relationships between the injurer and the victim to better accommodate the interests of both. As it has developed, the fault-based system holds the actor responsible for not accepting duties toward a relevant community, addresses human decisions that fail to protect the rights of the community, and adjusts easily to problems of proof and evidence.

Not only is the distinction between dangerous and abnormally dangerous activities not workable, it is not one that courts use. Many courts have intuitively understood that “strict liability,” as applied, is just a species of fault liability, focusing on whether the injurer has made unreasonable decisions about the frequency, location, method, or timing of her activity. In this respect, “strict liability” is an analog to regular negligence liability, providing a theory of responsibility for harm that is parallel to the responsibility for not being careful.

Accordingly, all accident cases should be reasonableness cases, with a court inquiring into whether the injurer made reasonable decisions about the quality of care in the activity and about the frequency, location, timing, and method of the activity. Where reasonable people would not think that the frequency of activity should make a difference—that is, where society does not want people to take frequency into account—there should be no inquiry into the frequency of the activity. Where the risk of

harm from the activity is not likely to vary with the location of the activity, no location-reasonable inquiry needs to be made. Where no reasonable person would think to trade-off one method of achieving a goal for a different method of achieving that goal, then no method-reasonable inquiry needs to be made. And where changing the time at which an activity is undertaken would not reduce harm, then no time-of-activity inquiry needs to be made. But in other cases, the plaintiff should be free to allege and prove that the defendant—even while exercising reasonable care—made unreasonable decisions about the frequency, location, method, or timing of activity.

Merging strict liability into negligence liability would make tort doctrine coherent, predictable, and normatively sound. It would put courts in the position that they should be in: to develop tools for assessing wrongdoing and responsibility that make accident law an organic whole.

